93-647

NO. _____

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1993

MAGNOLIA BAR ASSOCIATION, INC., MISSISSIPPI STATE CONFERENCE OF THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, RAINBOW COALITION, THE MISSISSIPPI ASSOCIATION OF BLACK SUPERVISORS, MISSISSIPPI CONFERENCE OF BLACK MAYORS, GEORGE FLAGGS, BENNIE THOMPSON, SHEILA JOHNSON, AND SAM McCRAY,

PETITIONERS

VS.

ARMIS E. HAWKINS, DAN M. LEE, LENORE L. PRATHER, MICHAEL D. SULLIVAN, EDWIN L. PITTMAN, FRED L. BANKS, JR., CHUCK R. McRAE, JAMES L. ROBERTS, JR., AND JAMES W. SMITH, JR., JUSTICES OF THE SUPREME COURT OF THE STATE OF MISSISSIPPI; MIKE MOORE, ATTORNEY GENERAL OF THE STATE OF MISSISSIPPI, KIRK FORDICE, GOVERNOR OF THE STATE OF MISSISSIPPI, AND DICK MOLPUS, SECRETARY OF STATE OF THE STATE OF MISSISSIPPI, MEMBERS OF THE STATE BOARD OF ELECTION COMMISSIONERS; THE MISSISSIPPI REPUBLICAN PARTY EXECUTIVE COMMITTEE; AND THE MISSISSIPPI DEMOCRATIC PARTY EXECUTIVE COMMITTEE,

RESPONDENTS

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. May a district court properly consider evidence relevant to the totality of the circumstances surrounding a claim under Section 2 of the Voting Rights Act of 1965, as amended, when determining whether plaintiffs have established the three *Thornburg v. Gingles* preconditions?

2. Did the Court of Appeals apply the proper legal analysis in reviewing the evidence presented by the parties on the issue of legally significant white bloc voting?

3. Did the Court of Appeals accord undue weight on the issue of legally significant white bloc voting to the fact that two incumbent black Supreme Court Judges, appointed in succession and during litigation, had subsequently won elections to fill the same seat on the Mississippi Supreme Court Central District?

4. Did the Court of Appeals apply the proper legal standard on plaintiffs' vote fragmentation claim in reviewing the evidence on the issue of whether or not plaintiffs had established the first *Thornburg v. Gingles* precondition , that the minority group "is sufficiently large and geographically compact to constitute a majority in a single-member district"?

5. Did the Court of Appeals err by substituting its judgment for that of the District Court on the issue of legally significant white bloc voting on plaintiffs' vote fragmentation claim?

LIST OF ALL PARTIES

The parties to the proceeding below were the petitioners, Magnolia Bar Association, Inc., Mississippi State Conference of the National Association for the Advancement of Colored People, Rainbow Coalition, Mississippi Association of Black Supervisors, Mississippi Conference of Black Mayors, George Flaggs, Bennie Thompson, Sheila Johnson, and Sam McCray, and the respondents, Armis E. Hawkins, Dan M. Lee, Lenore L. Prather, Michael D. Sullivan, Fred L. Banks, Jr., Chuck R. McRae, Edwin Lloyd Pittman, James L. Roberts, Jr., and James W. Smith, Jr., Justices of the Supreme Court of the State of Mississippi, Mike Moore, Attorney General of the State of Mississippi, Kirk Fordice, Governor of the State of Mississippi, Dick Molpus, Secretary of State of the State of Mississippi, Members of the State Board of Election Commissioners, the Mississippi Republican Party Executive Committee, and the Mississippi Democratic Party Executive Committee.

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OFFICIAL OPINIONS BY LOWER COURTS

Petitioners seek review of a decision rendered by the United States Court of Appeals for the Fifth Circuit. The Fifth Circuit's decision is reported as *Magnolia Bar Ass'n, Inc., v. Lee,* 994 F. 2d 1143 (5th Cir. 1993); [Supp. App. 1sa-19sa]. The Court of Appeals affirmed a decision rendered by the United States District Court for the Southern District of Mississippi. The District Court's decision is reported as *Magnolia Bar Ass'n, Inc. v. Lee,* 793 F. Supp. 1386 (S. D. Miss. 1992); [Supp. App. 20sa-78sa].

STATEMENT OF THE GROUNDS FOR INVOKING JURISDICTION

Petitioners seek to review, on Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit, the judgement and decision rendered in *Magnolia Bar Ass'n, Inc. v. Lee,* 994 F. 2d 1143 (5th Cir. 1993); [Supp. App. 1sa-19sa] on July 9, 1993.

The jurisdiction of this Court is invoked pursuant to 28 U. S. C. Sections 1254 and 2101 (c). The decision rendered by the United States Court of Appeals for the Fifth Circuit conflicts with the decision rendered by the United States Court of Appeals for the Eleventh Circuit in *Hall v. Holder,* 955 F. 2d 1563 (11th Cir. 1992), cert. granted *sub nom. Holder v. Hall,* 61 U.S.L.W. 3596. Additionally, the Fifth Circuit Court of Appeals, in *Magnolia Bar Ass'n, Inc. v. Lee,* supra, decided important questions of federal law in a way that conflict with the decisions of this Court in *Thornburg v. Gingles,* 478 U. S. 30 (1986) and *Anderson v. City of Bessemer City, N. C.,* 470 U. S. 564 (1985).

STATUTE INVOLVED

42 U.S.C. 1973

(a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a maanner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 4(f) (2) [42 U.S.C. 1973b (f) (2)], as provided in subsection (b).

(b) A violation of subsection (a) is established if, based on the totality of the circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: Provided, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

STATEMENT OF THE CASE

Petitioners, civil rights organizations and four (4) individual African-American voters, filed the instant action on August 17, 1990 challenging the present districting scheme and the method of election for Mississippi Supreme Court Judges. [1] At the time the action was filed, the Supreme Court was the only

[1] The present action is the second case challenging the method of electing Supreme Court Judges as being violative of Section 2 of the Voting Rights Act. Another case, *McCray v. Mississippi State Board of Election Commissioners*, was filed in 1984 but voluntarily dismissed in 1989.

appellate court in the State.[2] It consists of nine (9) members elected from three (3) districts to eight (8) year staggered terms of office. That is, each Supreme Court District elects three members, at-large, to numbered posts and for staggered terms. The three (3) districts dissect the State and its black population in East-West configurations. [App. 60a]. Each District includes approximately one-third of the State's land area and population. District Three, which covers the Northern Part of the State, has a total population of 815,365 persons and a black population of 264,978 persons. District One, which covers the Central part of the State, has a total population of 887,966 persons and a black population of 414,478 persons. And, District Two, which covers the Southern part of the State, has a total population of 869,885 persons and a black population of 235,601 persons. Mississippi has a total population of 2,573,216 persons of whom 915,057 are black. The black population is concentrated mostly in the western one-half of the State.

Supreme Court Judges are elected in partisan and general elections, with a majority vote required for party nomination. Vacancies are filled by gubernatorial appointment with special elections to fill the unexpired term.

Petitioners challenge the present districting scheme and method of electing Supreme Court Judges as violative of Section 2 of the Voting Rights Act of 1965, as amended, 42 U. S. C. 1973. A trial was held on their Section 2 claim from February 25 to 27, 1992.[3] At trial,[4]

[2]After the trial of the instant case, the Mississippi Legislature passed a bill creating an intermediate court of appeals consisting of five (5) judges elected from single-member districts that are coterminous with the State's Congressional Districts. H. B. No. 548, Laws of Miss. 1993.

[3]The District Court, after a hearing on October 18, 1991, denied petitioners' motion for a preliminary injunction. See, *Magnolia Bar Ass'n, Inc. v. Lee*, 793 F. Supp. at 1391; [Supp. App. 22sa]. The District Court, in making its ruling, considered the evidence presented at both the preliminary injunction hearing and the trial. *Id.*, at 1391; [Supp. App. 22sa].

[4]References in this Petition for Writ of Certiorari to the "trial" include both the trial on the merits in February, 1992 and the preliminary injunction hearing on October 18, 1991.

petitioners presented evidence on both their at-large multi-member district challenge and their line challenge. *Magnolia Bar Ass'n, Inc. v. Lee*, 793 F. Supp. at 1401-1421; [Supp. App. 20sa-78sa], [App. 1a-58a]. The District Court found, with respect to petitioners' multi-member challenge in the Central Supreme Court District, that petitioners had proven that the black population was sufficiently large and geographically insular such that a single-member black majority district could be created and blacks were politically cohesive. *Id.*, at 1403-05; [Supp. App. 71sa-74sa]. Petitioners presented expert testimony that white bloc voting was statistically and substantively significant.[5] That expert testimony was

[5]Petitioners' expert witness in the areas of analysis of voting patterns by race, racial bloc voting, political systems and quantitative and socioeconomic analysis, and minority vote dilution [App. 38a] testified that voting patterns in the Central Supreme Court District were severely racially polarized. [App. 1a-7a, 38a-41a]. Those patterns, he opined, are "[s]tatistically and substantively significant." [App. 1a]. His analysis revealed that blacks primarily had been elected to office in districts that were majority black. [App. 5a-7a]. Dr. Lichtman analyzed bi-racial contests involving circuit and chancery court elections in 1989 and 1990, [App. 1a, 4a], legislative elections in 1991, [App. 5a-6a], and various other elections including elections in the Second Congressional District and various counties over a 25 year period. [App. 39a].

He found that "[t]here were a couple exceptions, including the Reuben Anderson/Richard Barrett election, but these exceptions were "abberational and did not indicate a new trend or change in the existing pattern of racial bloc voting in black vs. white contests." [App. 40a]. He further opined that in the Banks vs. Dillard election a highly unusual number of whites [30%] crossed over and voted for the black candidate — Banks. Justice Banks' election was a special circumstance attributable to his incumbency, a highly unusual solid black vote and an atypical white vote for him. [App. 39a-41a].

Dr. Lichtman's expert conclusions were supported by the anecdotal testimony of Bob Owens, Tyree Irving, Honorable Lillie Blackmon Sanders, Solomon Osborne, Honorable Patricia Wise, and Honorable James Graves. Specifically, Bob Owens testified that the Banks campaign strategy was to spend all of their funds in the white community to get 25-30% white cross-over vote and depend on Justice's Banks ties to the black community to get the black vote. [App. 34a-37a]. The Banks campaign spent $130,954.46 compared to $49,035.41 spent by the Dillard campaign. The testimony of Irving, Sanders, Osborne, Wise, and Graves shows that it is extremely

supported by anecdotal testimony as well as other expert testimony regarding the rate of political participation being affected by socioeconomic conditions.[6] The cumulative effect of petitioners' racial bloc voting evidence is that white bloc voting is legally significant in the Mississippi Supreme Court Central District and throughout the State. [App. 1a-58a]. Such voting patterns are legally significant, according to petitioners' evidence, notwithstanding the fact that Reuben Anderson and Fred Banks two black incumbents appointed to the same seat on the Supreme Court approximately one year each before running for special elections had won their elections. [App. 1a-7a, 39a-41a].

Respondents attempted to controvert petitioners' legally significant white racial bloc voting evidence with the testimony of Kathryn Hester. [App. 31a-32a]. Respondents tendered Ms. Hester as an "expert and political analyst in voting patterns." [App. 31a]. The District Court did not accept her as an expert in that area. [App. 32a]. The respondents, thereafter, made an offer of proof wherein Ms. Hester stated that Anderson's and Banks' elections were "now the norm rather than an aberration." [App. 32a].

The District Court, in deciding that petitioners had failed to prove that white bloc voting was legally significant did not consider the anecdotal testimony of Owens, Irving, Graves, Sanders, Wise, and Osborne. Nor did the District Court consider the expert testimony of Engstrom on the issue of legally significant white bloc voting. The District Court did, however, consider this evidence in its analysis of the totality of the circumstances. *Magnolia Bar Ass'n, Inc. v. Lee*, 793 F. Supp. at 1407-1412; [Supp. App. 56sa-78sa].

unusual to have the amount of money for a judicial campaign that the Banks' campaign had, and it is more unusual to ignore the black community and expect to receive solid black support.

Dr. Lichtman's conclusions were corroborated by the expert opinion of Dr. Richard Engstrom that racial socioeconomic characteristics affected the level of political participation by the races. [App. 42a-43a].

[6] Id.

The District Court found that petitioners had proven the three (3) *Thornburg v. Gingles* preconditions on their line challenge. That is, the Districty Court found that petitioners had proven that a black majority district could be created, Id. at 1416, [Supp. App. 70sa-73sa], blacks are politically cohesive, Id. at 1416, [Supp. App. 73sa], and that white bloc voting is legally significant. Id. at 1416; [Supp. App. 73sa-74sa]. The District Court concluded, however, that under the totality of the circumstances the state policy for maintaining its East-West line configuration was not tenuous and foreclosed petitioners' "district lines vote dilution claim." Id. at 1417; [Supp. App. 75sa]. The trial court entered judgment dismissing petitioners' case.

Petitioners timely appealed the District Court judgment to the United States Court of Appeals for the Fifth Circuit. The Fifth Circuit ruled that, under the law in the Fifth Circuit, "section 2 claims must be analyzed under a two-part framework." *Magnolia Bar Ass'n, Inc., v. Lee,* 994 F. 2d 1143, 1146 (5th Cir. 1993); [Supp. App. 7sa]. A plaintiff, such as petitioners, "must first satisfy" the *Thornburg v. Gingles* preconditions. *Id.* at 1146; [Supp. App. 7sa]. Thereafter, the plaintiffs "must then offer evidence of the circumstances of the local political landscape..." *Id.* at 1146; [Supp. App. 7sa, 9sa]. The Fifth Circuit did "not reach [petitioners'] arguments that the district court erred in assessing the totality of the circumstances." *Id.,* at 1151; [Supp. App. 19sa].

The Court of Appeals addressed the issue of legally significant white bloc voting on petitioners' multi-member challenge. The Court held, "[a]lthough a close call, we think that the district court could reasonably conclude that the election of two black judges from the Central District was not aberrational, but rather, probative evidence that whites would not vote as a bloc so as to usually defeat the preferred supreme court candidate of black voters." *Id.* at 1149; [Supp. App. 14sa]. The appellate court "also [rejected] the [petitioners'] related argument that the election of Anderson and Banks had to be discounted because of

their status as incumbents." *Id.* at 1149; [Supp. App. 15sa]. The Court placed great weight on the Anderson and Banks election as evidence that white bloc voting was not legally significant.

With respect to petitioners' line challenge, the Court of Appeals found that the District Court's finding that white bloc voting was legally significant was error.

The appellate court affirmed the District Court's judgment on the *Thornburg v. Gingles* preconditions, except for the legally significant white bloc voting precondition on petitioners' line challenge, and the appeals court did not review evidence considered by the District Court under the totality of the circumstances analysis. The Fifth Circuit entered judgment on July 9, 1993, and petitioners now petition this Court for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

ARGUMENT I

A District Court may properly consider evidence relevant to the totality of the circumstances surrounding a claim under Section 2 of the Voting Rights Act of 1965, as amended, when determining whether plaintiffs have established the three *Thornburg v. Gingles* preconditions.

The Fifth Circuit Court of Appeals held, in the instant case, that totality of the circumstances evidence may be considered only after a voting rights plaintiff has proven, by a preponderance of the evidence, the three *Thornburg* preconditions. *Magnolia Bar Ass'n, Inc. v. Lee,* 994 F. 2d at 1146-47; [Supp. App. 7sa-9sa]. Indeed, the Court of Appeals did not consider the evidence considered by the District Court under that Court's totality of the circumstances analysis on petitioners' line challenge. This holding by the Court of Appeals is in conflict with the holding by the United States Court of Appeals for the Eleventh Circuit in *Hall v. Holder,* 955 F. 2d at 1568. The Eleventh Circuit held, in *Hall v. Holder,*

that "the totality of the circumstances surrounding a Section 2 claim may properly be considered when determining whether plaintiffs have established the three *Gingles* preconditions." *Id.* at 1568, 1570-1573. The Eleventh Circuit's approach is the more reasoned approach.

This Court should grant review, on certiorari jurisdiction, to resolve this conflict.

ARGUMENT II

The Court of Appeals did not apply the proper legal analysis in reviewing the evidence presented by the parties on the issue of legally significant white bloc voting.

This Court, in *Thornburg v. Gingles,* supra, at 56, held that there are a number of factors which affect the determination of legally significant white bloc voting. Specifically, this Court stated that the following factors may be considered when deciding the issue of legally significant white bloc voting:

> "the nature of the allegedly dilutive electoral mechanism; the presence or absence of other potentially dilutive electoral devices such as majority vote requirements, designated posts, and prohibitions against bullet voting; the percentages of registered voters in the district who are members of the minority group; the size of the district; and in multi-member districts, the number of seats open and the number of candidates in the field."

Id. at 56.

The Court further instructed lower courts that:

> [I]n a district, where elections are shown usually to be polarized, the fact that racially polarized voting is not present in one or a few individual elections does not necessarily negate the conclusion that the district experiences legally significant bloc voting. Furthermore, the success of a minority candidate in a particular election does not necessarily prove that the

district did not experience polarized voting in that election; special circumstances, such as the absence of an opponent, incumbency, or the utilization of bullet voting, may explain minority electoral success in a polarized contest.

Id. at 57.

It is clear, from its opinion, that the Court of Appeals did not apply the proper legal analysis in reviewing the evidence presented by the parties on the issue of legally significant white bloc voting. For instance, petitioners presented evidence from black judicial candidates for Mississippi's Chancery and Circuit Courts who testified that the 4th Circuit, 7th Chancery, 17th Chancery, and 6th Circuit Court Districts were unusually large and posed a formidable obstacle to black candidates ability to effectively campaign. Each of those districts is much smaller than any of the three (3) Supreme Court Districts. They also testified that they had difficulty raising money for campaigns. Their white opponents raised more money than them. None, with the exception of Ms. Sanders, was an incumbent. Justice Banks, on the other hand spent more than 2 1/2 times the money his opponent spent, and he still almost lost. Justice Banks, an incumbent, had to wage a stealth campaign so that white voters would not recognize his race. Numbered post election features present in Supreme Court elections had been found dilutive in some of the State's Chancery and Circuit Court Districts in *Martin v. Allain,* 658 F. Supp. 1183 (S. D. Miss. 1987). A majority vote is required for party nomination. Candidates must run in designated posts, and bullet voting is prohibited under the current electoral scheme. The Court of Appeals did not discuss any of this evidence in their legally significant white bloc voting decision. More importantly, the Court of Appeals did not discuss the testimony of Bob Owens and Dr. Allan Lichtman concerning the advantages Justice Banks had running as an incumbent. In short, the Court of Appeals did not apply the proper legal analysis in reviewing the evidence presented by the parties on the issue of legally

significant white bloc voting.

Since the Court of Appeals' decision conflicts with the "general principals" announced by this Court in *Thornburg v. Gingles,* supra at 57-58, and since this is an important issue in voting rights litigation throughout the country, this Court should grant review, on certiorari, to the United States Court of Appeals for the Fifth Circuit.

ARGUMENT III

The Court of Appeals accorded undue weight on the issue of legally significant white bloc voting to the fact that two incumbent black Supreme Court Judges, appointed in succession and during litigation, had subsequently won elections to fill the same seat on the Mississippi Supreme Court Central District.

The Court of Appeals accorded undue weight to the fact that two incumbent black Supreme Court Judges, appointed in succession and during litigation, had subsequently won elections to fill the same seat on the Mississippi Supreme Court Central District. The Court, in essence, reasoned that the elections of the black incumbents to fill the same seat, in succession, proved that white bloc voting is not legally significant in the Mississippi Supreme Court Central District. The weight accorded the election of the black incumbents was unwarranted and reversible. Former Justice Anderson was appointed to the Supreme Court by the Governor while litigation was pending approximately one year prior to his election. He ran against an avowed segregationist and won. Justice Anderson resigned from the Supreme Court and Justice Banks was appointed by Governor Mabus to take his place. Justice Banks served on the Supreme Court approximately one year prior to his election. He spent 2 1/2 times his opponent and barely won. Nevertheless, neither Justice Anderson's nor Justice Bank's elections proved a new voting pattern nor

trend had emerged among white voters. Out of several hundred election results studied over a 25 year period, the evidence established a pattern of persistent and pervasive racially polarized voting. Even in Justice Banks election, 70% of the white voters voted against him. This Court, in *Thornburg v. Gingles,* supra, at 57, stated that "a pattern of racial bloc voting that extends over a period of time is more probative of a claim that a district experiences legally significant polarization than the results of a single election."

The Fifth Circuit's holding gives more weight to a single or couple of isolated elections than it does to a pattern of racial bloc voting that extends over a period of time. The Fifth Circuit's holding conflicts with this Court's holding in *Thornburg.*

This issue is important because, if not reversed it could be used, particularly in the South, to impede political progress being made by minority voters in fully exercising their right to vote and electing candidates of their choice.

ARGUMENT IV

The Court of Appeals did not apply the proper legal standard on plaintiffs' vote fragmentation claim in reviewing the evidence on the issue of whether or not plaintiffs had established the first *Thornburg v. Gingles* precondition — that the minority group "is sufficiently large and geographically compact to constitute a majority in a single-member district."

The Court of Appeals, in reviewing evidence on petitioners' vote fragmentation claim, found that they had not established that a black voting age majority three-judge single-member district could be drawn in a North-South direction if the existing district lines were

altered. *Magnolia Bar Ass'n, Inc. v. Lee,* 994 F. 2d at 1148, 1150. The Fifth Circuit requires minority voters to prove that a majority minority voting age population district could be created under the first prong of the *Thornburg* analysis. This Court, in *Thornburg,* stated that "the minority group must be able to demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single-member district." *Thornburg v. Gingles,* supra, at 49. This Court did not require minority groups to prove that they could constitute a majority of the voting age population in a single-member district. This issue is extremely important in cases, such as the instant case, where the proposed districts would be unusually large and county boundaries respected. Where, as in Mississippi, minority voters are concentrated in a certain region of the State, the districts to be drawn are unusually large, and an attempt is made to preserve county boundaries, then the minority voters should be allowed to prove the first part of the *Thornburg* precondition by drawing a majority minority single-member district, in total population, instead of a majority minority voting age population single-member district. In the present case, petitioners' expert demographer drew a majority minority three-judge district respecting county lines running North to South.[7] [App. 55a-58a].

Since this issue is important to congressional, legislative, and judicial elections, and since the Fifth Circuit places a heavier burden on minorities in establishing the first *Thornburg* precondition than the *Thornburg* decision, this Court should grant petitioners' Petition for a Writ of Certiorari on this issue.

[7]Petitioners' expert demographer and cartographer, Senator Henry Kirksey, created a majority minority voting age population three-judge district using two split counties (but no split precincts). [See, App. 46a-47a, 59a].

ARGUMENT V

The Court of Appeals erred by substituting its judgment for that of the District Court on the issue of legally significant white bloc voting on plaintiffs' vote fragmentation claim.

A finding that white bloc voting is legally significant is reviewable under Rule 52(a)'s clearly erroneous standard. *Thornburg v. Gingles,* supra, at 78. "If the district court's account of the evidence is plausible in light of the record reviewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently." *Anderson v. City of Bessemer City, N. C.,* 470 U. S. at 573-74. The District Court's account of the *Thornburg* preconditions evidence on petitioners' line challenge is plausible in light of the entire record. The trial court's finding that white bloc voting throughout the State of Mississippi is legally significant is not clearly erroneous. The Court of Appeals should not have substituted its judgment on this issue for that of the District Court's. To do so was reversible error and an abuse of discretion. See, *Anderson v. City of Bessemer City, N. C.,* supra, at 573-575.

This Court should exercise discretionary review, grant petitioners' Petition, and reverse the Court of Appeals actions in setting aside the District Court's finding on legally significant white bloc voting on petitioners' line challenge.

CONCLUSION

Because the Court of Appeals for the Fifth Circuit rendered a decision which conflicts with decisions in the United States Court of Appeals for the Eleventh Circuit and this Court, this Court should grant petitioners' Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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Dated: October 4, 1993

APPENDIX 1

PARTIAL TESTIMONY OF

ALLAN J. LICHTMAN

ON PLAINTIFFS' PRELIMINARY INJUNCTION HEARING HELD ON OCTOBER 18, 1991 INCORPORATED INTO THE TRIAL ON THE MERITS

Pages 111-125

BY MR. RHODES:

Q. Dr. Lichtman, maybe I can just get to the heart of the matter and ask you whether or not you analyzed election returns for the State of Mississippi and whether or not based upon that analysis you have an opinion as to whether or not there is racially polarized voting in Mississippi.

A. I have extensively analyzed voting returns in various jurisdictions in the State of Mississippi using methodologies standard in the field of voter analysis. There is no question that the results of those many analyses demonstrate clearly that there is a persistent and severe pattern of racially polarized voting generally in the State of Mississippi.

Q. Now, have you also analyzed elections, black versus white contests, involving judicial races?

A. Yes. From my initial testimony in the *Martin v. Allain* case, I analyzed all of the judicial black and white elections held at that time. And to make sure my testimony was updated for this hearing, I also did an additional analysis of black versus white judicial elections held in 1989 and 1990.

Q. And the voting patterns by race, you testified that there was severe racially polarized voting. Were those patterns statistically significant?

A. Oh, yes. Statistically and substantively significant.

No question.

Q. Dr. Lichtman, could you explain what this table is and where the information on this table came from?

A. Yes. This is the result of exactly the same kind of analysis that I performed in the *Martin v. Allain* case and the many other matters I have been involved in Mississippi. It's a standard procedure known as extreme case analysis, where you look at the most heavily black and the most heavily white precincts within a county. In some cases we have 90 percent black and 90 percent white. In other cases we have 80 to 70 percent. All of this is based on voting-age population for the 1990 census. It's a very simple technique. It requires no statistical inference. You simply look at the actual vote tallied in those precincts within those counties for the black candidate and you then compare the results within the heavily black precincts and the heavily white precincts. If voting is polarized along racial lines, what you would expect to find, as we did find in the previous analyses I had done, is a much heavier vote being cast for the black candidates in the heavily black precincts than for the black candidates in the heavily white precincts. Obviously when you move from 70 percent to 90 percent precincts, your expectations may be somewhat different because in the 90 percent precincts they're much more homogeneous with respect to blacks. But, nonetheless, when you look at the comparison at any one of these three levels between the black precincts and the white precincts, if voting is polarized along racial lines, you would expect to see substantially a higher percentage for the black candidates in the black as opposed to the white precincts, which is what I found in all of those many analyses that I have done previously. And so this simply reports them for each level of black precincts and each level of white precincts that we found in these judicial elections the percentage of the vote actually cast for the black candidates. In those areas we had 90 percent black precincts. The vote for the black candidate was, on average, a grand mean of all the precincts, 89 percent. In

sharp contrast, in the 90 percent plus white precincts, the vote cast for the black candidate was only 11 percent, a very substantial difference between the black vote — the vote for the black candidate in the black precincts as compared to the vote for the black candidate in the white precincts.

Similarly, among the 80 percent precincts, they cast 65 percent of their vote for the black candidates whereas the 80 percent white precincts cast 14 percent of their vote for the black candidate. And, finally, in the 70 percent plus black precincts, the black candidates received on average 67 percent of the vote whereas the 70 percent plus white precincts, the black candidates only received 15 percent of the vote. These patterns are indicative of a continuation in the 1989 and 1990 elections of very extreme racial polarization. In fact, the polarization is equally or more extreme than that which I observed in judicial elections held prior to 1989.

Q. And did you not use the election returns and precinct data by race in performing your analysis?

A. The analysis is performed on the basis of the official election returns, the identification of white and black candidates, and the 1990 census data by precinct which indicates the percent of blacks in the voting-age population. The same data, same methods that social scientists rely on for this type of analysis and that I relied on in the past.

MR. RHODES: Your Honor, we would now tender he document as an exhibit.

THE COURT: P-6 will be received into evidence.

(Exhibit Number P-6 received into evidence.)

BY MR. RHODES:

Q. Dr. Lichtman, I would like to hand you what's been introduced in evidence as Plaintiffs' Exhibit 3 and ask you to take a minute to look over it for the central Supreme Court district.

A. Yes.

Q. And it shows — which is the first district on that table.

A. Yes.

Q. The bottom, it shows total population for that district, white population with the percentage and black population with the percentage.

A. I see it.

Q. Let me ask you, have you analyzed election returns in any of those counties that's included in the central Supreme Court district?

A. As I said, I did not selectively analyze any election returns. I analyzed all chancery and circuit court elections, including the Barry Ford election, that were available. And this Ford election and all others are factored into these numbers. Now, many of the counties that I analyzed are, in fact, contained within this central district because they had black versus white judicial elections in 1988 or 1989, including Hinds County, by far the largest of the jurisdictions within the central district, Holmes County, Humphreys, Noxubee, Sharkey, Sunflower, Warren, Yazoo, just to name a few. So the great bulk of what is in here — Claiborne was also encompassed within the analysis that I did. And all races, regardless of their outcome, are reflected in the table that we have before us today.

Q. Beside analyzing judicial elections, have you analyzed other elections such as legislative elections or elections for boards of supervisors or any other office?

A. Well, not specifically to update for this hearing, but I have analyzed elections for numerous as I have testified, in many cases previously, for numerous public offices within the State of Mississippi, legislative offices, presidential primaries, executive offices, a great number of different type. Congressional offices. A great number of different type offices in addition to judicial.

Q. Looking at what the population is and what it is by race for the First Supreme Court District which is the central district, and taking into account and consideration the analysis of election returns that you have done and that you have come to a conclusion that there is racially polarized voting, do you have an opinion

as to whether or not the racially polarized voting would impact the ability of blacks to elect a candidate of their choice from the First or Central Supreme Court District?

A. To put it very simply, clearly in a district that has a 52 percent white population majority, and although I don't have the numbers before me, it's going to be a larger white voting-age population majority, the results of racially polarized voting analysis have a direct bearing on this district. Given a pattern of severe racially polarized voting, a district with a white majority would be a district that would impede the opportunities for the black voters of that district to be able to elect candidates of their choice. That would be true even if we presumed equal white and black turnout because of the significant white population and voting-age population majority. In other words, this conclusion does not depend upon any presumptions about white or black turnout. If, in fact, as I have generally found in Mississippi black turnout was lower than white turnout, that would further impede the opportunities for black voters to elect candidates of their choice. But the argument does not depend upon that to conclusion.

Q. Now, in analyzing the trends of voting by the races in Mississippi, were you able to discern or ascertain whether or not there is a trend now to elect black candidates from white majority districts?

A. Let me answer that in two ways. Certainly the updated racial polarization analysis does not show a trend which indicates that polarization doesn't come anything close to being eliminated. Taking into account all the races, all the elections, there's still severe polarization. One also has some other relevant updated data to look at in terms of whether there is a trend, that is, we have more than 170 elections held state-wide for the state legislature. I looked at those for my testimony in *Watkins v. Mabus* and looked at the updates for the most recent elections and I found that all but one instance blacks were only being elected to legislative positions in districts that were 60 percent or more black

and for the most part were only being elected in districts that were 65 percent or more black. We also have nearly 80 circuit and chancery court districts. Again, with the one exception that's been much discussed here, blacks have succeeded in electing candidates of their choice, once again, only in black majority districts. So you are talking there about between the chancery and circuit court and the state legislature, a state-wide sample of some 250 elections, and the pattern is overwhelmingly consistent with the persistence of racially polarized voting and the persistent difficulty of blacks being able to elect candidates of their choice in anything but black majority districts.

Let me make clear that when social scientists talk about racially polarized voting or patterns, we don't mean it's got to be every black voter and every white voter. Nothing like that, of course. What we are talking about is that generally blacks tend to vote for candidates of their choice and generally whites tend to vote for different candidates of their choice. We are talking about black electoral success. We are obviously not talking about shutting out blacks entirely from the possibility of being elected in white majority districts. Again, we are talking about patterns. And it — the pattern here is not a slight one. It's an overwhelming pattern that blacks have real opportunities to elect in black majority districts but not in white majority districts. And the fact that there are exceptions here and there in no way detract from the finding of that overall pattern, and I see no trend that indicates that pattern has been in any substantial way changed.

Q. I believe you also testified in *Watkins v. Mabus* that all things being equal, special elections could pose some potential problem for black candidates. Have I misstated the testimony?

A. I'll tell you exactly what I said.

Q. Yes, sir.

A. What I said was all other things being equal, and I was very careful to say that, any socioeconomically

disadvantaged group is probably better off with elections that are not held as special elections but are held as general elections, all things being equal.

Q. Well, if —

MR. SANDERS: May it please the Court, I object to that testimony and that answer and I would move to strike that because as I understood Mr. Rhodes' tender of this witness, the field was in analyzing voter returns and not — he was not offered to give his opinion as to voter behavior, which is, I think, as I appreciate it, what he just testified to. And I object to that and move to strike.

THE COURT: Overruled.

BY MR. RHODES:

Q. Now, you are saying all things being equal, if special elections are held wherein you have single member majority or super majority of black districts and/or you have an opportunity to hold regular elections where you might have an at-large system and majority white districts, which one of those situations would be more harmful to black voters?

MR. SANDERS: May it please the Court. May I have a continuing objection to this line?

THE COURT: Yes, sir.

A. Clearly under conditions of racially polarized voting that we found here, the two hypotheticals imposed would mean all things are no longer equal. Under those circumstances there is no question in my mind that it would be preferable in terms of opportunities for minorities to hold the elections in districts that have substantial black majorities than in districts with white majorities irrespective of the time period of those elections. Certainly the composition of the district would be much more important.

MR. RHODES: If the Court will indulge me one moment.

(Off the record.)

MR. RHODES: We tender the witness, Your Honor.

APPENDIX 2

PARTIAL TESTIMONY OF

HONORABLE JAMES GRAVES
CIRCUIT COURT JUDGE, 7TH CIRCUIT COURT DISTRICT

AT THE TRIAL HELD ON FEBRUARY 25, 1992

Pages 18-26

BY: MR. RHODES:

A. I am the circuit judge in Hinds County.

Q. And how long have you been a circuit judge?

A. I was appointed by the governor in February of 1991 and then I was elected to that position in September of 1991.

Q. And were you elected from a single-member district or from the district at large?

A. It was from a single-member district.

Q. And what district were you elected from?

A. That was Hinds County, Subdistrict 3.

Q. Now, is that a majority black or majority white subdistrict?

A. It's a majority black subdistrict.

Q. Judge Graves, since you have been serving as a circuit judge, have you been subjected to any sort of political pressure or pressure from the people that whom elected you?

A. None whatsoever.

Q. When you were campaigning for the office, were you able to raise money from all segments of the society?

A. I guess to some extent the answer to that would be yes, but primarily my contributions came from the black community.

Q. Were you able to raise a lot of money with which to wage your campaign?

A. Overall, I think we raised in the neighborhood of

$25,000, which I would not consider a lot of money.

Q. Now, when you were campaigning for your position, were you invited by various civic groups to come speak and to come into the — come to the organizations with which to address them?

A. I was invited by some civic groups and organizations to come and address those organizations.

Q. Now, the organizations and civic groups that invited you, were they predominantly black or white?

A. The predominantly black organizations and civic groups are the ones that extended an invitation for me to come.

Q. Did you receive any invitations from the white civic groups and organizations within your district?

A. I think I received one from the Hinds Southwest Community Association. But that would be the only one that I received.

MR. RHODES: If the Court will indulge me a moment.

(Off the record.)

MR. RHODES: We tender the witness, Your Honor.

REDIRECT EXAMINATION

BY MR. RHODES:

Q. Judge Graves, when you were invited to the white law firms to campaign and when you were campaigning, did you receive a substantial monetary contribution? By "substantial" I mean at least 30 percent of the total amount of money that you received in your campaign. Did you receive a substantial monetary contribution from the white firm?

A. One of the problems I have is there is this nondisclosure requirement under the Canons of Ethics in terms of the amount of contribution. So when I would go to these firms, of course I wouldn't accept any contributions and it was never disclosed to me what individual contributions amounted to. I think under the statute when those amounts exceed $200, they are required to be reported to the Secretary of State's office. So then when they are disclosed in that manner to the Secretary of State's office, I am privy to those types of

disclosures. But what would happen at some of those firms is individual members of the firms would just write checks and those would be given to my campaign manager, and I never knew who gave them or how much. So the best I could give you would be an estimate as to the amount of aggregate contributions from those firms. And an estimate would be out of $25,000 — and I am trying to do my math because you said about 30 percent, so I guess that would be around $7,000. I can't be sure. I think I can say safely that less than 40 percent would have come from those types of contributors, and it may very well have been less than 30 percent. But, again, because of what we are not supposed to know and what my campaign manager made sure I didn't know, I can't say with a lot of accuracy about the amount of those contributions.

Q. Could you tell whether or not the majority of your contributions came from the white community or the black community?

A. The majority of the contributions came from the black community.

APPENDIX 3

PARTIAL TESTIMONY OF

HONORABLE LILLIE BLACKMON SANDERS
FORMER CIRCUIT COURT JUDGE, 6TH CIRCUIT
COURT DISTRICT

AT THE TRIAL HELD ON FEBRUARY 25, 1992

Pages 36-45

BY MS. McDONALD:

Q. Would you state your name for the record, please?

A. Lillie Blackmon Sanders.

Q. And Ms. Sanders, where do you live?

A. Natchez, Mississippi.

Q. Okay. And you are a practicing attorney in Natchez?

A. Yes, I am.

Q. Okay. What, if any, political offices have you held?

A. I have served as the circuit judge for the Sixth Judicial District on an appointment from Governor Mabus back in 1989.

Q. Okay. And you say that's the Sixth District?

A. Sixth Judicial District.

Q. Circuit district.

A. That's correct.

Q. And tell me what counties does that district comprise?

A. Adams, Jefferson, Franklin, Amite, and Wilkinson.

Q. And who was your opponent in that race?

A. I ran for the special term and my opponent was Richard Watson.

Q. I'm sorry. I sort of skipped. You had to run for special election, right?

A. Yes, I did.

Q. Okay. And your opponent was?

A. Richard Watson.

Q. And is he the present circuit judge?

A. Yes, he defeated me and he went on to win a full term this past year.

Q. Okay. Now, you said that the counties are comprised of Adams, Franklin, Jefferson, and Wilkinson.

A. That's correct. There were five counties in the circuit court district.

Q. All right. And you had Amite, right?

A. Amite, yes.

Q. And you had to campaign in that five-county area?

A. Yes.

Q. About how — could you give us some sense of how large that area is?

A. Probably about 100 miles square.

Q. And did you encounter any difficulties in campaigning in that geographical area?

A. Yes. Campaigning in a rural Area is where people are spread out much further and you basically campaign seven days a week, six or seven hours a day if you weren't working, you know, Sundays — Sundays were the worst day because you were campaigning from early in the morning until late at night and you would sometime travel great distances, 60, 70 miles, to meet ten people at a gathering.

Q. So the campaigning is expensive, or is it?

A. Its expensive and it's tiring on the body, too.

Q. Okay. Concerning your — during your campaign, what kind of contributions did you get? I understand that you don't know who gave you the contributions, but do you know the amount versus your opponent that you received?

A. I saw one campaign expenditure for my opponent, and this was like a day before election day. He had spent approximately $60,000.

MR. SANDERS: May it please the Court, I object to that. That's not responsive to the question. And expenditures, of course, do not necessarily relate to contributions. He may have been spending his own

money.

THE COURT: All right. Please listen and answer the question that is asked. Sustain the objection. The question was how much contributions did you receive and how much did he receive.

A. Okay. My contributions were, for the circuit court race, was like $14,000 to about $80,000 that was contributed to Mr. Watson-s campaign.

BY MS. McDONALD:

Q. Now, you have also — during the course of that campaign, would you tell me what kind of groups or organizations did you speak to?

A. Churches, organizations, Kiwanis.

Q. Were they generally black churches or —

A. Predominantly. All of my audiences were predominantly black with the exception of a few white organizations that invited me to speak. The Rotary Clubs, Kiwanis group, and a couple of other community groups invited me to speak to them.

Q. But for every, say, ten black groups that you spoke to, how many white groups would you say you spoke to?

A. A half maybe, you know. There were very few white groups. Less than five probably.

Q. During the course of the campaign?

A. During the entire campaign.

Q. And how long did that campaign last?

A. From April to June.

Q. Okay.

A. Well, really from February to June.

THE COURT: When you say white groups and black groups, how many of the black groups — how many black groups did you speak to, predominantly black?

A. Probably 100. Probably 100.

THE COURT: And of those, how many would be church groups?

A. I would say about 50 or more.

BY MS. McDONALD:

Q. Now, during the course of the campaign, you had literature and your opponent had literature. Could you

describe that for the Court, please?

A. Okay. For the most part we had, we both had, just cards and we would pass out leaflets. Toward the end of the campaign a card went out to white constituents with a picture of me and a picture of my opponent. I was upset because the picture of me was like a copy made out of a newspaper and I appeared looking like a gorilla with his new picture of himself beside it.

Q. Okay. Would that be what Plaintiffs have introduced as Exhibit P-33?

A. If I could see it.

Q. I will show it to you.

A. Yes, that's it.

Q. Okay. Now, you mentioned that that document went to white constituents. How do you know that?

A. Because a white constituent brought it to me. She was upset that something like that was being sent to the people in her neighborhood.

Q. Okay. How do you know that it didn't go to black neighborhoods?

A. Because once I had found out it had gone out, I tried to determine whether or not anybody else had received it, any black voters in my district, and I didn't find one. It went to specific voting precincts and only to the white voters.

Q. When you say specific voting precincts," what do you mean by that?

A. For instance, in Adams County, the precinct called Duncan Park is a predominantly white precinct, and each time you have an election, regardless of what kind of election, a thousand voters will vote there. And in my race there were probably 25 or 30 blacks who vote there. The numbers always correlate with the number of blacks registered versus white, so it ' s like a thousand to 25 votes .

Q. Now, you have — or have you run for any other political office?

A. Yes. In the 1990 elections I ran for chancery court judge in the Seventeenth Judicial District.

Q. And what counties or which counties does that district comprise?

A. Wilkinson, Adams, Jefferson, and Claiborne.

Q. And who was your opponent?

A. Hyde Rusty Jenkins.

Q. Is he the incumbent judge?

A. Yes, he was the incumbent at that time, and he defeated me in that race.

Q. What was the margin there?

A. He won by 142 votes.

Q. Do you know what the black voting age population is?

A. I believe it's about 67 percent.

Q. Now, would you tell us — how was campaigning in that election? Was it any different than in the election with Judge Watson?

A. No, it was the same kind of campaigning, door to door, churches, in rural areas, and it stretched from the Claiborne county line to the Wilkinson county line which is probably 80 miles, just straight down the Mississippi River. And I went from communities to churches to groups and things of that nature. And, ironically, a card like this was circulated. I don't have a copy of it. It was the same card. It had the same exact information on it on my side, except on this side it had Mr. Jenkins picture and his qualification.

Q. Now, was there also any other ads presented in any other counties?

A. In each — well, in Claiborne County I am sure there was an ad featured in the newspaper that showed the pictures of the judicial candidates.

Q. Would that be Plaintiffs' Exhibit P-34? I will show it to you.

Q. How much did you spend, Ms. Sanders?

A. Approximately $14,000.

Q. And do you have any knowledge — which election was that that you spent the 14,000?

A. That's the circuit court.

Q. What about the chancery court?

A. In the chancery race I spent about $12,000.

Q. And do you have any independent knowledge of what your opponent spent?

THE COURT: Answer that question. Don't answer the amount.

A. Yes.

BY MS. McDONALD:

Q. What is that knowledge based on?

A. My conversation with Mr. Jenkins.

Q. Was it more than what you spent?

A. Considerably.

M. SANDERS: May it please the Court? We have the same objection. That's hearsay as the conversation was with a non-party.

THE COURT: Sustained.

MS. McDONALD: That's all we have, Your Honor.

THE COURT: All right. Mr. Kirchmayr, you may cross-examine the witness.

APPENDIX 4

PARTIAL TESTIMONY OF

HONORABLE PATRICIA WISE
CHANCERY COURT JUDGE, 5TH CHANCERY COURT DISTRICT

AT THE TRIAL HELD ON FEBRUARY 25, 1992

Pages 78-85

BY MS. McDONALD:

Q. Would you tell the Court from what district you come?

A. I am one of four chancellors in the Fifth Chancery District of the State of Mississippi and I sit as a Division 4 chancellor for our chancery division.

Q. Okay. Is it a subdistrict?

A. Yes. I am from — I was elected from Subdistrict 2.

Q. Now, during the course — when were you elected?

A. I was elected in — well, I was sworn in July 3 of 1989. The election took place June 20, 1989.

Q. Okay. And were you — was the district that you now are chancellor from, was that as a result of the *Martin v. Allain* case?

A. Yes.

Q. Now, during your election back in 1989, who was your opponent?

A. From the Democratic standpoint in the primary, Sarah O'Reilly Evans, William Patterson, as Democrats, and from the Republican, which is in the primary, Billy Keyes and Frank Coxwell. I won the Democratic primary and was their nominee, and then in the general election I faced a Republican candidate, Billy Keyes.

Q. Did you campaign or did you make any speeches to any civic organizations?

A. I did.

Q. Were they primarily black or white?

A. They were about 99.9 percent all black in terms of the request of coming and being able to speak at their meetings or such.

Q. Were you invited to any white civic groups or churches or whatever?

A. I do not — I was not invited. I was just trying to recall even at what percent. I don't recall ever being invited to speak as a candidate in any form other than a black forum. There might have been, and I don't — I don't even remember there being, really, white persons in the audience of the different organizations that I spoke to.

Q. Okay. Could you describe in a little bit further detail how you — well, let me just ask you this. In terms of raising money, did you have any difficulty raising money?

A. Yes. Very much.

Q. Would you describe that, please?

A. Well, first of all, in general, there was just difficulty soliciting as a judge. Of course, I could not ask directly for funds, and there was a Committee to Elect Patricia Wise Chancery Judge. But there was difficulty in the amount of money, the persons who would really be in a position to give money, black people who would be in a position to give money, and there was — there was just an overall difficulty in raising money to pay for media print campaign.

Q. Were you ever, or to your knowledge as much as you can know, I guess, do you know whether you got any law firm support generally, not specifically.

A. Generally black law firms. The reason why I will say black law firms is because we did attempt — well we didn't attempt. We did mail from my Committee to Elect Patricia Wise letters soliciting campaign donations and such.

Q. To black and white law firms?

A. To black and white law firms.

Q. Now, during the course of your election, or during

the course of the 1989 election, did you run into any racial appeals in terms of your opponent or anyone else?

A. Yes, I did. Taking the issue of Billy Keyes first, and that was in the general election schedule, June 20, '89, there was a pamphlet that he distributed, Committee to Elect Billy Keyes, with my picture on one side and his picture on the other side listing from his perspective our qualifications and credentials.

Q. And —

A. From the primary I would run into, in terms of the campaigning, Bill Patterson and difficulty in that he was free, if you will, to campaign in what we considered the black neighborhoods, giving fish fries and such and that kind of thing, and his being invited to speak at functions that were primarily black oriented, but never being asked to participate in any functions that were just a reverse.

Q. So you never participated in any or were invited to any?

A. No. You have to remember that in — well, in 1989, the election of judges was very new, and one of the things that the candidates did, not only myself but others, was to just to spread the word and educate the community. So, many organizations took it upon themselves, I mean black organizations such as fraternities, sororities, and such, to sponsor forums. They invited all the candidates that were running, that had qualified to run to the different activities.

Q. Were these black fraternities?

A. These were black fraternities and sororities.

Q. Now, is Mr. Keyes black or white?

A. Mr. Keyes is a white male.

Q. What about Mr. Patterson?

A. Mr. Patterson is a white male.

MS. McDONALD: I beg the Court's indulgence.

(Off the record.)

Q. Judge Wise, you mentioned that there was a card that was sent around by Mr. Keyes that had your picture on it and his picture. Would it be similar to Plaintiff's Exhibit P-32?

A. Yes, very, very similar.

Q. Okay. And tell us what Plaintiff's Exhibit P-32 is, for the record.

A. All right. It's a pamphlet or a sheet of paper I am holding that is a copy, I assume, and it's an advertisement paid by the Committee to elect W. O. "Chet" Dillard Supreme Court Judge. And it shows Justice Banks on one side and Judge Dillard on the other side and the heading says "Exercise your constitutional right to vote on the Mississippi Supreme Court" —

MR. KIRCHMAYR: Your Honor, we are going to object. That's in evidence. I think it speaks for itself.

THE COURT: All right. Overrule the objection.

BY MS. McDONALD:

Q. Now, Judge Wise, did you consider the pamphlet that Mr. Keyes distributed to be a racial appeal?

A. Yes, I did. Yes, I did.

Q. Do you consider that exhibit to be a racial appeal?

A. Yes, I do.

Q. Judge Wise, were there any black chancellors elected in Mississippi prior to 1989?

A. No, not to my knowledge.

Q. And who — other than yourself who are the black chancellors ?

A. A colleague that sits also in the Fifth Chancery District, Judge Denise Sweet Owens, and myself are the only two black chancellors.

Q. In the state.

A. In the state.

MS. McDONALD: That's all I have, Your Honor.

THE COURT: Did you campaign in any white neighborhoods?

A. We attempted to campaign somewhat in white neighborhoods on a very small scale, but we quickly realized that that would not be what we wanted to do because the campaign material would not stay up even in that borderline part of Jackson in which my subdivision lie. We would put it up one night and it

would be down the next day or that afternoon, so we decided that it would be better not to waste the funds and the campaign material attempting to campaign in the white neighborhoods.

THE COURT: Did you do any house-to-house campaigning in black neighborhoods?

A. Yes.

THE COURT: Did you do any house-to-house campaigning in white neighborhoods?

A. Yes.

THE COURT: As far as personal calling as opposed to putting up signs.

A. Some parts of subdivision to — still a mixture of black and white, and with that we did, without knowing per se who actually lived in the house, would knock on the door and try to distribute our campaign literature.

THE COURT: So I take it, then, that where there was an all-white neighborhood that you just simply avoided doing door-to-door campaigning in those areas?

A. Yes. Your Honor. for a number of reasons.

THE COURT All right. So your appeals were — would it be fair to characterize your campaign as being an appeal to the black voters in your subdistrict?

A. Yes. But not necessarily by choice.

APPENDIX 5

PARTIAL TESTIMONY OF

TYREE IRVING

AT THE TRIAL HELD ON FEBRUARY 25, 1992

Pages 88-94

BY: MR. RHODES:

Q. Mr. Irving, do you hold or have you held any position in any bar associations?

A. I am the past president of the Magnolia Bar Association.

Q. And when were you president of the Magnolia Bar?

A. When was I?

Q. Yes, sir.

A. To be honest, I can't recall right now. I believe it was 86 or ' 87 or somewhere in that area. I have also served several years as treasurer of the Magnolia Bar Association.

Q. Mr. Irving, what is your experience, work experience, as far as being an attorney?

A. Well, when I first graduated from Ole Miss, I worked for approximately six months as a staff attorney with North Mississippi Rural Legal Services while I was waiting for my clerkship with the Mississippi Supreme Court to commence, which began on, I believe it was June 1 or July 1 of 1975, and I worked for the late chief justice of the Mississippi Supreme Court for a year. When that was over, I went to New York City and worked as the Earl Warren fellow with the NAACP Legal Defense and Educational Fund. I returned to Mississippi after a year and set up private practice in Laurel, Mississippi. I worked there as a solo practitioner, I believe, about six, seven, eight months. And then I was appointed Assistant United States Attorney for the northern district of Mississippi. And I worked in that

position approximately 15 months, after which I left and went into private practice as a partner in the newly formed law firm of Walls, Buck & Irving. I was there until the end of '88 and then I came back to my home county, which is Leflore County. I ran for public office, and after being unsuccessful in that effort, I went into private practice there in Leflore County, and that's where I am now.

Q. Which public office did you run for?

A. I ran for chancery judge of the Seventh Chancery District, Subdistrict 2.

Q. And do you know which counties comprise that?

A. Yes, sir. The counties: Leflore, Quitman, Tallahatchie, and Tunica. Those counties in their entirety.

Q. And for the record, what is your race?

A. I am African-American.

Q. Did you have an opponent in that race?

A. I did.

Q. And do you know who your opponents were and what were their races?

A. In the election that was held April 4 of 1989, there were three of us in the, I believe, the Democratic primary. Jon Barnwell, who is now Chancellor Barnwell and Shirley Rice, and myself. I ran again in November of '90, and my opponent in the race at that time was Chancellor Jon Barnwell.

Q. When you campaigned for the office of chancellor did you experience any difficulty in being able to wage an effective campaign?

A. Of course, the — quite a bit of difficulties. The Subdistrict 2 of the Seventh Chancery District is a fairly long district. It extends from approximately five or six miles north of the Humphreys County — well, I should say north of Belzoni to approximately 10 miles south of the Tennessee border. It's largely a rural agriculture area.

THE COURT: Let me interrupt you just a minute so I can understand.

A. Yes, sir.

THE COURT: You ran April of 1989. Was that the regularly scheduled election? And then you said you ran in November of 1990. I assume that that was the special election schedule after the resolution of *Martin v. Allain.*

A. The April election was the election that was scheduled after the resolution of *Martin v. Allain* and the November of '90 was the regular scheduled election. It went back into the regular rotation cycle.

THE COURT: All right. So the subdistrict in which you ran was created as a result of *Martin v. Allain.*

A. That is correct, Your Honor.

THE COURT: All right.

BY: MR . RHODES:

Q. If you could continue about difficulties you experienced.

A. I just described the length of that district. Of course, it takes quite a bit of time just to travel from one end of the district to the other. Secondly, the fact that it's very rural, it's very densely — excuse me, sparsely populated throughout that subdistrict with the exception of Greenwood, for the most part probably has the -- not probably. It does have the largest concentration of voters in that district. And I recall in Tunica County and Tallahatchie County you have quite a few precincts dispersed throughout those counties and a lot of little what I would call hamlets, but it's important to try to get in those little areas to campaign. And it just, you know, from a time perspective as well as a cost perspective, all of my campaign was by car, of course. I didn't have any means of or the funds to fly from this area to that area, so it was a matter of driving up and throughout that district. Very time consuming and very costly to just to try to get in all of the little hamlets throughout that district.

Q. I believe you testified that the northern part of your election district ran about 10 miles south of Memphis and Tunica County. If you had to wage a media campaign such as television, what market would you have had to gone to?

A. Well, I didn't do any television except, I guess, a still picture on the cable weather network there in Leflore County. That was a still picture. And I did that only in one of the campaigns. Most of the media that I — well, all of the media that I attempted to utilize was radio, and because of the way that district is laid out, it was necessary — it would have been necessary if I had covered the entire district to go into the Memphis market to buy radio ads on the radio stations out of Memphis to cover the northern flank of the district, and then I had to deal with radio stations there in the Delta to cover the southern and portions of the central part of the district. I never was able to, because of lack of funds, to do any advertising on the in the northern flank. So for the most part, Tunica County, I was not able to do any advertising in — radio advertising, that is, in Tunica County and in portions of Tallahatchie and Quitman County did not receive any advertising from radio. There were some stations in what, I believe Charleston that covered portions of Tunica County — excuse me, portions of Quitman County and maybe just a little bit of the southern tip of Tunica, but I talked to a lot of folk there in Quitman, excuse me, in Tunica County and none of them ever heard anything on the radio, so it was my understanding that the reach of those radio stations out of Greenwood did not, you know, get that far.

Q. What about television?

A. No, I didn't do any advertising on television, as I said, but had I — except for that still shot that I spoke of. If I had done any television advertisement, it would have been absolutely necessary to go into both of those markets, that is, the Memphis market and the Delta market because the Jackson — in Greenwood, for example, we get, of course, the television station in Greenville and the television station there in Greenwood and television stations out of Jackson that — but the folk in Tunica County and in Quitman County, I believe their market comes — television stations come out of Memphis and they don't get the basic Jackson stations

nor the same — I think maybe in some of the towns in the central part of that district may pick up the Greenwood and the Greenville station, but it would have been absolutely necessary to cover the entire district to advertise both in the Memphis market and the Jackson and Delta market.

Q. In terms of costs, which would have been more expensive for you, running a television campaign, running a radio campaign, or campaigning door to door and with groups and organizations?

A. Of course, a television campaign, I suppose, would have been the most expensive. As I said, we didn't do any of that. The radio, I mean I chose radio in the areas we did advertise because it was the cheapest and I thought I could get the most bang for my bucks by going radio. Of course, the door-to-door campaigning is always expensive in the sense that in the rural areas such as that, I mean you, if you are going to effectively campaign those areas, you have got to have large numbers of folk out there, not just yourself, and you have got to at least, if you don't do anything but pay the folks' expenses, gas expenses. You get into quite a bit of money if you are trying to fan out and canvass the entire district.

Q. Did you personally or did your campaign — I know you did not know the contributions from — or what sources they were from for your campaign, but did your committee experience any difficulty in raising funds with which to wage your campaign?

A. Oh, quite a bit of difficulty, yes, sir.

Q. And what community did your campaign funds come from primarily, the black community or the white community?

A. Probably 99.99 percent black community.

Q. Now, prior to your running for the office of chancellor in that district, are you aware of whether or not any other black person has ever been elected chancellor or circuit judge in that region of the state commonly referred to as the Delta region?

A. No. No one has — no black American has been elected.

APPENDIX 6

PARTIAL TESTIMONY OF

SOLOMON OSBORNE

AT THE TRIAL HELD ON FEBRUARY 25, 1992

Pages 101-104

BY: MS. McDONALD:

Q. And what, if any, political offices have you run for during your —

A. No, no, 4. District 4. Subdistrict — District 4, Subdistrict 3, yeah.

BY: MS. McDONALD:

Q. Okay. And what counties does that comprise?

A. Holmes, Leflore, Washington, Sunflower, Humphreys. But I only ran in Holmes and Leflore.

Q. Was that the subdistrict?

A. Right. Subdistrict 3 covered two counties.

Q. Okay. Now, during the course of your campaign, did you have occasion to — well, who was your opponent?

A. The incumbent, Judge Gray Evans.

Q. And did you run as a Democrat or a Republican?

A. Democrat.

Q. Did he run as a Democrat or a Republican?

A. Independent, I believe.

Q. Okay. And what is his race?

A. White.

Q. Now, were you successful in that race?

A. No. You mean did I win?

Q. Right.

A. No.

Q. During the course of your campaign, could you describe for us how you campaigned, was it a media campaign or was it like grass roots, door-to-door campaign?

A. Basically door to door. Really didn't have any funds to do a media campaign.

Q. Now, not that you necessarily know who your funding sources or — well, who your specific funding sources were, but do you know where your support came from, your financial support?

A. Basically from the blacks in the district.

Q. Okay. And during the course of your campaign were you invited to speak at various organizational meetings.

A. Churches and civic organizations, yes.

Q. Would you characterize whether or not you were invited to speak at more black organizations than white?

A. Only black organizations.

Q. Okay. You were not invited to speak at any white organizations?

A. No.

Q. And what did your campaign primarily consist of?

A. What do you mean?

Q. You mentioned earlier door-to-door campaigning.

A. Right.

Q. Did you do any media campaigning at all?

A. No, I didn't.

Q. Okay. Why didn't you do any?

A. Basically we didn't have any money.

Q. Did you distribute campaign literature at all?

A. Yeah, we did leaflets and fliers.

Q. And —

A. And, you know, the little push cards, things of that nature, posters. We had posters, too.

Q. Okay. What kind of campaigning did your opponent do?

A. I guess all kinds that people normally do in political races. He was on TV, in the newspaper, visited churches in the black community. And other organizations, too, like, you know, the NAACP and the Voters League, and especially in Greenwood the Freedom Democratic Party, and in Holmes County these were predominantly black organizations.

Q. Did he also speak at white — predominantly white

organizations?

A. Well, the only thing I know is what I saw in the paper. Yeah.

Q. And what was that?

A. I saw excerpts from addresses he made at various organizations.

Q. And what, if any, political offices have you run for during your —

A. Circuit judge in District 7, Subdistrict 3.

APPENDIX 7

FACTS THE DISTRICT COURT

TOOK JUDICIAL NOTICE OF

AT THE TRIAL HELD ON FEBRUARY 25, 1992

Pages 119-120

THE COURT: All right. The Court, then, will take Judicial notice, as requested, from the opinion of this Court in *Martin v. Allain*, found at 658 F. Supp. beginning at 1183 as follows: The black voting-age populations in the chancery court districts before the subdistricts were created as those figures are found in the text on pages 1187 through 1192; a segment of the history of official discrimination as found on page 1192; and of fact number 31 concerning racial appeals by candidates, found on page 1195; also the racial makeups of the subdistricts that the Court created as those figures appear in the text of *Martin v. Mabus*, which is published at 700 F. Supp., beginning at page 327. And those figures are contained in the text thereof at pages 336 through 343.

The Court will not take judicial notice of fact number 21 on page 1193 concerning whether or not Justice Reuben Anderson was the first successful judicial black candidate. It is unnecessary to do that since the facts concerning ex-Justice Anderson, Justice Banks who is now serving, are part of the stipulation. Likewise, the fact that Mr. Lichtman characterized Mr. Anderson's victory as an aberration contained in fact 23 on page 1194, it is not necessary for the Court to take judicial notice of since the Court did not make a finding as to that. That was simply a statement of what Mr. Lichtman had testified to. Mr. Lichtman — the stipulation concerning what Mr. Lichtman would testify in this case also contains the same thing, so it is unnecessary to take judicial notice of that.

APPENDIX 8

PARTIAL TESTIMONY OF

KATHRYN H. HESTER

AT THE TRIAL HELD ON FEBRUARY 26, 1992

Pages 159, 162-163, 210-211

MR. KIRCHMAYR: Your Honor, at this time we would move to have Ms. Hester recognized as an expert in the field of redistricting, that is, the field of drawing electoral districts, and also as an expert and political analyst in voting patterns.

MR. RHODES: Your Honor, we have no objections in recognizing her in the area of redistricting, the drawing of lines, demography, topography, but we do object to her being recognized as an expert in the field of political analysis of voting patterns. We would not object if she was to be offered as an expert in analyzing statistical data rather than actually in the field of analyzing voting patterns by race.

BY: MR. KIRCHMAYR:

Q. Based on what you have reviewed and testified to today, specifically concerning the successful elections of two black lawyers, former Justice Reuben Anderson and Justice Fred Banks, to the Mississippi Supreme Court, in your opinion, were these elections aberrations?

MR. RHODES: Objection, Your Honor. Whether or not elections are aberrational depends upon whether or not elections fall within a trend or voting patterns by race. And in order to draw that conclusion, the expert must be able to analyze voting patterns by race using the standard methodology, so we would object.

MR. KIRCHMAYR: Your Honor, in that regard I would certainly disagree. I think that the term "aberration is a very easy term for one that has been — to understand, is

it unusual. And I think that the qualifications of this witness certainly allow her to make that conclusion based on the material that she has reviewed, based upon the political campaigns that she has been involved in. I think she can make that conclusion.

THE COURT: I think that the term in the context of this lawsuit lies within the statistical analyses that the other experts have done, and that is outside of the expertise of this witness. Certainly, if she would have an opinion, I don't think that opinion would be of any assistance to the Court related otherwise to — the objection is sustained.

MR. KIRCHMAYR: If the Court will indulge me just a moment.

(Off the record.)

MR. KIRCHMAYR: Your Honor, for the purposes of the record we understand the Court's objection, but could I have her to proffer her answer just for purposes of the record?

THE COURT: Yes, sir.

A. The term aberration in its most common meaning is tending away from the norm. The two black candidates that have run for the Supreme Court in the central district, a district which is a majority white voting-age district, have both won with substantial white support and are now the norm rather than an aberration.

MR. KIRCHMAYR: We have no further questions and tender the witness at this time, Your Honor.

APPENDIX 9

PARTIAL TESTIMONY OF

BOB OWENS

AT THE TRIAL HELD ON FEBRUARY 27, 1992

Pages 286-293

BY: MS. McDONALD:

Q. Okay. What races were you associated with, could you give the Court some kind of indication about, and what kind of media coverage? You received free media coverage?

A. I have been involved with from — three justice court races. Clyde Chatman, either served as manager or co-manager in his campaign for two of his election. I was the manager for Denise Owens, my wife's campaign for chancery court judge. I was one of the strategists involved with the James Graves campaign, campaign for circuit court judge, involving Judge Gibbs' campaign. I also served as the coordinator, one of the coordinators for Judge Banks' campaign for the Supreme Court.

Q. Okay. And let me ask you this. In judicial elections what is the media coverage strategy in those judicial elections?

A. Okay. With judicial elections, and not saying this wouldn't apply to other elections, but my involvement has mostly been with judicial elections. The first thing you analyze is the racial makeup of your district. If you have a reasonable chance of winning with the number of black votes that's available, we are talking 60 some percent black votes, then your media strategy would be to — let me see. Your strategy would be to maximize your black votes, to minimize the white votes that come out to vote in that election. And to do that, you would stay away from media that has the effect of going over into the white community. It's an accepted principle in

judicial election is you stay out of their community because what you are doing, you stir up your votes, or you stir up people to come out and vote against you, and that costs you money, time, and you are only losing there.

Q. Okay. Now, you mentioned that you were a strategist in the recent Banks election to the Supreme Court. Would you tell me whether you campaigned in the white community in that election?

A. I served as one of the coordinators in his campaign, one of three coordinators. I wouldn't classify as the strategist, but I was involved in all decisions that was made concerning strategy and have input and all the things but it was the — overall strategy was made sort of like a group.

Q. And you were privy to that decision and you participated in the making of that decision?

A. Yes. Very few things was made — very few decision was made that I didn't either agree in the beginning or agree in the end before it was actually done. I was a very active —

Q. Can you tell me — excuse me. Could you tell me what that strategy was in the white community, if you campaigned in the white community?

A. Well, Judge Banks campaign, we had to first look at the weakness and strengths of the campaign. The strength being that he's super qualified, education, as a judge, intellectual, et cetera, and we had strengths on one side. The main weakness we had was his race, was he's black. That's the main thing we had to deal with during the campaign. That, with the fact that he's running in a district that's majority white. So our main strategy during the whole campaign is we have a black candidate running in a white district, how can we possibly get a small percentage of the white votes for a candidate that this is the only issue that we were weak on is his race. Without the race issue, we got a landslide candidate because he — you got everything you dream of for a candidate. So we had to look at a possibility of how

do we get into the white community and attract the few whites that might consider voting for a black candidate. To do that, there's counties that we decided the best strategy is not to go in that county. We just don't do anything. Just hope you get a percentage of the white votes by them — some out here by qualification, but the person Fred Banks don't go into that county.

Q. How did they hear about the qualifications and did you spend any money on getting out his qualifications, et cetera?

A. Okay. Then when we used the media — okay. Let me just say, the strategy would be if there are some counties that there's some chance of some white folks voting, you let Fred go there to a certain length. He does not go there as a normal candidate and just campaign and meet people. He only go there if we can find respected white person who's willing to walk beside him and say "he's all right" type of position. And if that — if you can identify that person in that community, that works, but you can't just send him down just like a candidate into a — into the white community and say "I'm Fred Banks. I want to talk to you about my qualification." That does not work. Okay. But in those communities that you can't identify the respected person to do that, and I use respected loosely, respected to the people in that community, in that, you know, in that particular group.

Then for the — you could not get all his qualification that way, but that was because the people that we would actually go visit and some counties we just didn't go in the county period because we only lose vote by having him to physically appear. Then we go to the media coverage and then we have to have a real detailed strategy for how can we sell this person' s qualification who we have no fear that he can — we got the best qualified person, but not offend people because of his race. Okay? Then you try to say how can I get them to like him and focus on qualification despite his race. That's the reason you didn't see any pictures. The feeling

is if you will see his qualifications, see he is so qualified you might like him before you realize he's black and then, hopefully, a small percentage still would go ahead and vote for him despite the fact that he's a black candidate. So the media coverage was totally geared towards the small white vote that we needed to win. And we had to gamble on spending our money on media totally addressed to the people we thought 25, 30 percent of the people that we thought we could pull from the white community.

Q. And how much of your spending would you say was on media targeted to the white community to get his qualifications out?

A. We originally had a budget, and that budget was divided among what we thought we were going to spend in the black community to be sure he's well-known there and get people out to vote, et cetera, and the white community for the television, et cetera, because we realized we didn't have the numbers in the black community, we ain't going to spend — eliminating the money for the black community almost totally and giving it all to the white community and the things that was directed for the white community. Now, when I say "totally," you know there's some mailing we would do in the black community to keep people and stuff, but the original strategy would have been — in the campaign was to mail out letters, et cetera, to the black community, do we get out the vote and actually walk the streets. The money we had budgeted for that all was eliminated to go because we had to try to get this 25 percent or 30 percent.

Q. Okay. Can you give me an estimate in terms of percentages, maybe, as to how much of the monies that were expended that were targeted to getting the vote in the white community; if you know?

A. Yes. What I am saying is that we took all the money, we took it all, and I coordinated a lot in the black community and with the strategies that we don't have any money. We raised more money than we expected to

raise. But we took all the money basically and, you know, we say — an example is for to get out to vote except it might be $20,000 originally budget, we might get 200, because we really made the decision that, okay, we are going to have to spend all of our money. We are going to have to spend three to four times the money our opponent is spending in the white community to get out vote, and we are going to hope and pray and use our friends and Fred's former associates to try to get the word to the black community because the trouble in getting 25, 30 percent of the white votes, it takes everything you got and Fred had — Judge Banks had to have those votes and we made the gamble with a real fear that we could easily lose this race by the black not turning out because we was not motivating people and wasn't campaigning in the black community, so all of our money went to the white community to try and get those votes and try to deal with the race issue and try to get them to vote for him despite of his race.

APPENDIX 10

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

MAGNOLIA BAR ASSOCIATION, ET AL.
PLAINTIFFS

VS. CIVIL ACTION NO. J90-0413(B)

ROY NOBLE LEE, ET AL.
DEFENDANTS

(FILED FEBRUARY 25, 1992)

STIPULATION REGARDING PLAINTIFFS'

EXPERT TESTIMONY

The parties acknowledge that this stipulation will reduce the costs and time of litigation in this case commensurate with the goals of the Civil Justice Reform Act of 1990, 28 U.S.C. §§ 471, *et. seq.* The parties specifically reserve all objections to the relevancy of any of these facts and conclusion.

1. The parties hereby stipulate that if the Plaintiffs' were to call Dr. Allan J. Licthman and Dr. Richard Engstrom to testify in this case that their testimony would be as reflected below. Unless otherwise indicated in this stipulation, the parties are not stipulating to any facts or conclusion, but only that if those witnesses were called, the below reflect the testimony that they would present. The parties stipulate that Dr. Allan J. Lichtman is an expert witness in racial bloc voting, political systems, and quantitative and socioeconomic analysis as well as the area of minority vote dilution. Dr. Lichtman has been admitted as an expert witness in voting behavior, political history, political systems, and

quantitative and socioeconomic analysis in some thirty (30) federal court cases in which he has presented oral or written testimony.

2. In conjunction with his work as an expert witness, Dr. Lichtman has analyzed numerous black v. white elections in the State of Mississippi. Dr. Lichtman only analyzed black verse white election contest in reaching his conclusion. The analyzed elections include judicial elections throughout the State of Mississippi (including Circuit, Chancery, and Supreme Court elections), elections in the Second Congressional District, and elections in the following cities and counties: Cleveland, Greenwood, Jackson, Oxford, Bolivar County, Chickasaw County, Grenada County, Hinds County, Madison County, Monroe County, Newton County, and Yazoo County. The analyses covers an approximately twenty-five-year period through 1992 and includes a wide range of local, state, and federal offices.

3. The parties stipulate that the Plaintiffs' expert, Dr. Lichtman, performed the analysis using the accepted and recognized ecological regression and homogeneous precinct methods, and that the values for (r) (r^2), which measures the strength of the correlation and linear relationships of the variables being examined, are acceptable. Racially polarized voting occurs when black voters generally prefer different candidates. Extreme case analysis and homogeneous precinct analysis refer to the same methodology utilized for analyzing election and voter data for precincts predominantly of the same group, in the instant case predominantly black and predominantly white precincts.

4. Results of the ecological regression analyses show a pattern of severe racial polarization in elections held in the State of Mississippi. Analyses results show that black voters are a highly cohesive electorate who invariably support black candidates by substantial majorities. In contrast, white voters strongly unite behind white candidates, generally providing very little crossover votes for black candidates. This very strong

bloc voting by whites would pose a formidable obstacle to black candidates seeking office in districts with a white voting age majority. Dr. Lichtman's professional opinion is that voting patterns by race do not vary substantially throughout Mississippi. Generally, whites bloc vote within the same range or degree throughout all of Mississippi, and black voters bloc vote within the same range or degree throughout all of Mississippi. In the elections analyzed, generally 70-99% of white voters voted for white candidates and 70-99% of black voters voted for black candidates in black vs. white contests. There were a couple exceptions, including the Reuben Anderson/ Richard Barrett election, but these exceptions were abberational and did not indicate a new trend or change in the existing pattern of racial bloc voting in black vs. white contests.

5. White bloc voting exists such that generally white voters defeat the candidates preferred by the black electorate in black vs. white contests.

6. In the Banks vs. Dillard Supreme Court election, ecological regression analyses shows a much higher turnout rate of white than of black voters. An estimated 27% of voting age blacks turned out to vote compared to 45% of voting age whites. Thus black candidate Banks achieved a narrow (51 to 49 percent) victory in the presence of racial bloc voting and black/white turnout differentials. This result does not, however, alter Dr. Lichtman's previous finding that white bloc voting is generally sufficient to defeat black candidates in white-majority districts. First, Banks gained election as a result of the combination of virtually unanimous (99%) black support combined with a 30% white crossover vote. Not only is it unrealistic to assume 99% black support for black candidates, but based on Dr. Lichtman's previous analyses of numerous black versus white contests, including some 20 judicial elections, it is clear that Bank's white crossover vote is much higher than the crossover vote that black candidates generally can expect from white voters. Generally, black candidates

can expect no more than a 15% white crossover vote in black vs. white contests. Without maximum black cohesion and such atypical high crossover, Banks, would not have been elected from Supreme Court District 1. It should be noted that like former Justice Reuben Anderson, Banks was an appointed incumbent seeking election. Not only in Mississippi, but also in other southern states, appointed judicial incumbents have significant advantages not available to other black candidates. In Alabama, for example, appointed Justice Oscar Adams was elected to the State Supreme Court, whereas white bloc voting was consistently defeating non-incumbent black candidates for judicial office, statewide. Similarly, in Florida, appointed Justice Joe Hatchett was elected to the State Supreme Court although white bloc voting was consistently defeating non-incumbent black candidates for judical office. Dr. Lichtman's information on Alabama was derived from his participation as an expert witness in the state-wide judical case *(SCLC vs. Seigelman)*. His information on Florida was derived from his participation as an expert witness in judicial cases in the Jacksonville and Tallahassee circuits *(Nipper v. Chiles* and *Davis v. Chiles)*.

7. In Dr. Lichtman's professional opinion, the dilutive effect of multi-member Supreme Court districts is the same as other multi-member districts, both judicial and non-judicial. Under conditions of racially bloc voting, candidates supported by a cohesive black majority are generally defeated by white bloc voting. The study of Mississippi elections shows that white bloc voting is sufficiently strong generally to defeat candidates of choice of the black electorate in majority-white multi-member districts.

8. In addition to the creation of single-member districts with substantial black majorities, it is possible to remedy the dilutive effects of multi-member districts through limited voting. This procedure, limits to a single vote the number of votes that an individual can cast in

an election for several members of a collegial body such as the State Supreme Court. It enables a cohesive minority group to concentrate its votes on a single candidate, and, in turn, can prevent the majority from casting a sufficient number of votes to defeat that candidate. The adoption of limited voting, unlike the formation of multi-member districts, would require the elimination of staggered terms. All candidates must run simultaneously for office, so that minority voters could concentrate their ballots on a single candidate in a multiple candidate field.

9. The parties stipulates that Dr. Richard Engstrom is an expert witness in socioeconomic analysis, political systems, and political participation, and that Dr. Engstrom applied the standard methodology in analyzing socioeconomic data, by race, for the instant litigation.

10. In Dr. Engstrom's professional opinion, educational attainment is a central indicator of socioeconomic status and a major determinant of political participation. Blacks in Mississippi suffer seriously depressed levels of education compared to those for whites. According to the 1980 census figures for education and income (the latest data available), 47.3% of blacks in Mississippi have no more than an elementary school education compared to only 18.3% of whites. Less than a third (32.7%) of blacks had graduated from high school compared to 63.9% for whites. While 30% of whites had at least some college education, only 14.9% of blacks had some college education.

11. In Dr. Engstrom's professional opinion, disparities in education are reflected in disparities in income, another important determinant of political participation. Over half of black families in the State (55.1%) had an annual income of less than $10,000 compared to only 24.4% for whites. In contrast, 26.9% of white families had an income of $25,000 or more, compared to 7.5% of black families. Per capita income for blacks was $2,833,

compared to $6,484 for whites. The relative poverty of Mississippi blacks preclude them from possessing many of the politically relevant private resources to the same degree as whites. Specifically, blacks are less likely to have access to communication and transportation resources that facilitate efforts at political mobilization. For example, a third (30.1%) of housing occupied by blacks did not have a telephone compared to only 10.0% of those occupied by whites. Likewise, the occupants of 27.8% of the housing units in which black live are without a private vehicle, compared with only 6.8% of the units within which whites reside.

This the 24th day of February, 1992.

/s/Carroll Rhodes
CARROLL RHODES

/s/Deborah McDonald
DEBORAH McDONALD

ATTORNEYS FOR PLAINTIFFS

/s/Stephen J. Kirchmayr
STEPHEN J. KIRCHMAYR

/s/Giles Bryant
GILES BRYANT

/s/Robert E. Sanders
ROBERT E. SANDERS

ATTORNEYS FOR DEFENDANTS

APPENDIX 11

EXHIBIT P-36

CERTIFICATION

SPECIAL ELECTION
November 5, 1991

STATE SUPREME COURT JUDGE

DISTRICT ONE (CENTRAL), PLACE 2

County	Fred Banks, Jr. (D)	W. O. (Chet) Dillard (R)
Bolivar	4,070	2,155
Claiborne	2,951	820
Copiah	3,614	3,360
Hinds	35,083	31,454
Holmes	4,031	1,580
Humphreys	1,807	1,148
Issaquena	353	256
Jefferson	2,589	570
Kemper	2,205	1,616
Lauderdale	7,427	10,002
Leake	3,321	3,458
Madison	7,693	7,419
Neshoba	3,732	3,606
Newton	3,042	3,563
Noxubee	2,559	1,153
Rankin	9,326	17,876
Scott	2,989	3,627
Sharkey	1,200	783
Sunflower	3,759	2,221
Warren	6,802	7,265
Washington	5,857	4,358
Yazoo	3,712	3,659
TOTALS	118,122	111,949

Current District Statistics
02/23/92
10:02 PM

Total and Voting Age Population By Race
Current Supreme Court District

DISTRICT	TOTAL POP.	WHITE POP.	WHITE %	BLACK POP.	BLACK %	OTHER POP.	OTHER %
Total Population							
District 3 (North)	815,365	545,386	66.89%	264,978	32.50%	5,001	0.61%
District 1 (Central)	887,966	463,647	52.21%	414,478	46.68%	9,841	1.11%
District 2 (South)	869,885	624,428	71.78%	235,601	27.08%	9,856	1.13%
Total	2,573,216	1,633,461	63.48%	915,057	35.56%	24,698	0.96%

DISTRICT	TOTAL VAP	WHITE VAP	WHITE VAP %	BLACK VAP	BLACK VAP %
Voting Age Population					
District 3 (North)	583,931	413,956	70.89%	166,367	28.49%
District 1 (Central)	623,064	353,675	56.76%	263,205	42.24%
District 2 (South)	619,462	465,056	75.04%	148,097	23.91%
Total	1,826,457	1,232,687	67.49%	577,669	31.63%

District Ideal 857,739

District Deviation:

District 3 (North)	-4.94%
District 1 (Central)	3.52%
District 2 (South)	1.42%
	8.46%

APPENDIX 13
EXHIBIT P-37

State Total Population 2,573,216
Ideal for 9 single member 285,913
Ideal for 3 multi-member 857,739

Adjusted	Dist/County	TP	BP	a % a	TVAP	BVAP	a % a
D-11	III-1	286,351	180,216	62.94%	189,770	108,629	57.24%
	Dev. 438						
	Den % + .015%						
	III-2	283,619	132,831	46.83%	198,359	84,818	42.76%
	Minus Lawrence	-12,458	-4,132	-33.17%	-8,700	-2,559	-29.41%
		271,161	128,699	47.46%	189,659	82,259	43.37%
	Dev. 14,752						
	Den. % -5.16%						
	III-3	308,235	153,289	49.73%	221,330	100,339	45.33%
Minus	Madison Precinct	-12,774	-1,191	-9.32%	-9,470	-888	-9.38%
		295,461	152,098	51.15%	211,860	99,451	46.94%
Minus	Ridgeland Precinct	-10,332	-1,960	-18.97%	-8,048	-1,503	-18.68%
		285,129	150,138	52.66%	203,812	97,948	48.06%

Dist/County	TP	BP	a % a	TVAP	BVAP	a % a
	285,129	150,138	52.66%	203,812	97,948	48.06%
Minus Madisonville Precinct	-723	-137	-18.95%	-535	-83	-15.51%
	284,406	150,001	52.74%	203,277	97,865	48.14%
Minus Trace Harbor Precinct	-836	-17	-2.03%	-580	-12	-2.07%
	283,570	149,984	52.89%	202,697	97,853	48.28%
Minus Hinds Precinct (78)	-4,618	-106	-2.30%	-3,714	-91	-2.45%
	278,952	149,878	53.73%	198,983	97,762	49.13%
Minus Hinds Precinct (46)	-2,319	-55	-2.37%	-1,720	-41	-2.38%
	276,633	149,823	54.16%	197,263	97,721	49.54%
Minus Hinds Precinct (79)	-3,205	-232	-7.24%	-2,482	-157	-6.33%
	273,428	149,591	54.71%	194,781	97,564	50.01%
Dev.	-12,485					
Dev. %	-4.379					
TOTAL 3 District	831,940			574,210	288,455	50.24%
Dev.	-25,799					
Dev. %	-3.01%					

APPENDIX 14
P-1

90 pop county by race

County	Total Pop.	White	Black
Adams	35,356	18,028	17,212
Alcorn	31,722	25,085	3,540
Amite	13,328	7,272	6,038
Attala	18,481	11,114	7,299
Benton	8,046	4,669	3,168
Bolivar	41,875	15,259	26,326
Calhoun	14,908	10,829	4,027
Carroll	9,237	5,560	3,654
Chicksaw	18,085	11,060	6,981
Choctaw	9,071	6,319	2,731
Claiborne	11,370	1,994	9,340
Clarke	17,313	11,312	5,977
Clay	21,120	9,789	11,266
Coahoma	31,655	11,001	20,454
Copiah	27,592	13,602	13,920
Covington	16,527	10,699	5,795
DeSoto	67,910	58,860	8,675
Forrest	68,314	46,672	21,001
Franklin	8,377	5,290	2,079
George	16,673	15,025	1,587
Greene	10,220	7,999	2,194
Grenada	21,555	12,563	8,916
Hancock	31,760	28,625	2,774
Harrison	165,365	127,630	32,281
Hinds	254,441	123,177	129,558
Holmes	21,604	5,176	16,375
Humphreys	12,134	3,856	8,222
Issaquena	1,909	833	1,072
Itawamba	20,017	18,596	1,359
Jackson	115,243	90,114	23,581
Jasper	17,114	8,410	8,687
Jefferson	8,653	1,185	7,462
Jefferson Davis	14,051	6,330	7,675
Jones	62,031	46,193	15,489
Kemper	10,356	4,407	5,739

County	Total Pop.	White	Black
Lafayette	31,826	23,151	7,980
Lamar	30,424	26,599	3,637
Lauderdale	75,555	48,706	26,260
Lawrence	12,458	8,300	4,132
Leake	18,436	11,086	6,558
Lee	65,581	51,260	14,049
Leflore	37,341	14,516	22,642
Lincoln	30,278	21,162	9,038
Lowndes	59,308	36,736	22,041
Madison	53,794	29,789	23,731
Marion	25,544	17,733	7,721
Marshall	30,361	14,842	15,378
Monroe	36,582	25,394	11,097
Montgomery	12,386	6,916	5,440
Neshoba	24,800	16,945	4,611
Newton	20,291	13,697	5,831
Noxubee	12,604	3,959	8,585
Oktibbeha	38,375	24,064	13,171
Panola	29,996	15,376	14,533
Pearl River	38,714	32,888	5,545
Perry	10,865	8,333	2,447
Pike	36,882	19,931	16,843
Pontotoc	22,237	18,917	3,246
Prentiss	23,278	20,477	2,741
Quitman	10,490	4,250	6,193
Rankin	87,161	72,033	14,610
Scott	24,137	14,829	9,171
Sharkey	7,066	2,339	4,686
Simpson	23,953	16,124	7,373
Smith	14,798	11,516	3,244
Stone	10,750	8,362	2,344
Sunflower	32,867	11,604	21,092
Tallahatchie	15,210	6,257	8,881
Tate	21,432	13,945	7,417
Tippah	19,523	16,251	3,233
Tishomingo	17,683	17,010	631
Tunica	8,164	1,992	6,148
Union	22,085	18,804	3,213
Walthall	13,352	8,252	6,054
Warren	47,880	28,879	18,666

County	Total Pop.	White	Black
Washington	67,935	28,334	39,197
Wayne	19,517	12,506	6,957
Webster	10,222	7,953	2,254
Wilkinson	9,678	3,123	6,532
Winston	19,433	11,151	8,094
Yalobusha	12,033	7,479	4,526
Yazoo	25,506	11,958	13,443
	2,573,216	1,633,461	915,057

1991 ELECTION CYCLE

POLITICAL COMMITTEE'S REPORT OF RECEIPTS AND DISBURSEMENTS

REG. # _____

Name of committee THE COMMITTEE TO ELECT JUSTICE FRED BANKS

Address of committee POST OFFICE BOX 55507, JACKSON, MS 39296 County HINDS

Telephone 601 939 3895

Name of director REUBEN ANDERSON

Name of treasurer HARRY M. WALKER

☐ Check here if above is different from previous report.

If the committee is authorized by the candidate:
Name of candidate _____
Address _____
Office sought _____
Political Party _____

RECEIVED
JAN 11 1992
SECRETARY OF STATE

TYPE OF REPORT

• CHECK BELOW THE CATEGORY OF REPORT YOU ARE SUBMITTING •

X	June 10, 1991 Periodic Report (Complete through May 31, 1991)	Mandatory
X	July 10, 1991 Periodic Report (Complete through June 30, 1991)	Mandatory
X	Sept. 10, 1991 Pre-Election Report (Complete through Sept. 7, 1991)	As required by law
X	Oct. 1, 1991 Pre-Runoff Report (Complete through Sept. 28, 1991)	As required by law
____	Oct. 10, 1991 Periodic Report (Complete through Sept. 30, 1991)	Mandatory
____	Oct. 29, 1991 Pre-Election Report (Complete through Oct. 26. 1991)	As required by law

EXHIBIT

51a

APPENDIX 15

X Jan. 10, 1992 Periodic Report (Complete through Dec. 31, 1991) — Mandatory

_____ Termination Report (Committee will no longer accept campaign contributions or make campaign expenditures and has no outstanding campaign debts or obligations.) — Required in order to terminate reporting obligations

NOTES: (1) Periodic reports are mandatory, even if no contributions or expenditures have transpired. In such case, the committee shall submit a report indicating "0" for total amount of reported contributions and expenditures during this period.

(2) Until a committee files its termination report, it must continue to file annual reports in accordance with Miss. Code Ann. Section 23-15-807(b)(ii) and (iii).

REPORTED CONTRIBUTIONS AND EXPENDITURES

	This period	Calendar year-to-date
Total amount of reported contributions	$ 6,500.00	$ 13,500.00
Total amount of reported expenditures	$ 37,464.19	$ 130,954.46

I certify that I have examined this report and to the best of my knowledge and belief it is true, accurate, and complete.

Kay Mitchell — 1-8-92

(Signature of director or treasurer) (Date)

Authority: Refer to Miss. Code Ann. Sections 23-15-801 1972 et seq. for statutory requirements.

Penalties: Failure to submit required reports, or failure to submit reports in accordance with statutory deadlines, or failure to submit valid reports shall result in prosecution in accordance with Miss. Code Ann. Sections 23-15-811 and -813 (1972).

SS91-2 1/15/91 Rev.

1991 ELECTION CYCLE

POLITICAL COMMITTEE'S REPORT OF RECEIPTS AND DISBURSEMENTS

REG. # _____

Name of committee COMMITTEE TO ELECT W. O. "CHET" DILLARD

Address of committee P. O. BOX 123, Jackson, MS 39205 County HINDS

Telephone 948-1547

Name of director Robert W. King, Finance Chairman

Name of treasurer _____

☐ Check here if above is different from previous report.

If the committee is authorized by the candidate:
Name of candidate W. O. "Chet" Dillard
Address P. O. Box 686, Jackson, MS 39205

Office sought Supreme Court
Political Party Republican

RECEIVED
JAN 13 1992
DICK MOLPUS
SECRETARY OF STATE

53a

TYPE OF REPORT

• CHECK BELOW THE CATEGORY OF REPORT YOU ARE SUBMITTING.

_____	June 10, 1991 Periodic Report (Complete through May 31, 1991)	Mandatory
_____	July 10, 1991 Periodic Report (Complete through June 30, 1991)	Mandatory
_____	Sept. 10, 1991 Pre-Election Report (Complete through Sept. 7, 1991)	As required by law
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XXXX	Jan. 10, 1992 Periodic Report (Complete through Dec. 31, 1991)	Mandatory

_____ Termination Report (Committee will no longer accept campaign contributions or make campaign expenditures and has no outstanding campaign debts or obligations.)

Required in order to terminate reporting obligations

NOTES: (1) Periodic reports are mandatory, even if no contributions or expenditures have transpired. In such case, the committee shall submit a report indicating "0" for total amount of reported contributions and expenditures during this period.

(2) Until a committee files its termination report, it must continue to file annual reports in accordance with Miss. Code Ann. Section 23-15-807(b)(ii) and (iii).

REPORTED CONTRIBUTIONS AND EXPENDITURES

	This period	Calendar year-to-date
Total amount of reported contributions	$ 23,021.58	$ 49,046.58
Total amount of reported expenditures	$ 24,046.01	$ 49,035.41

I certify that I have examined this report and to the best of my knowledge and belief it is true, accurate, and complete.

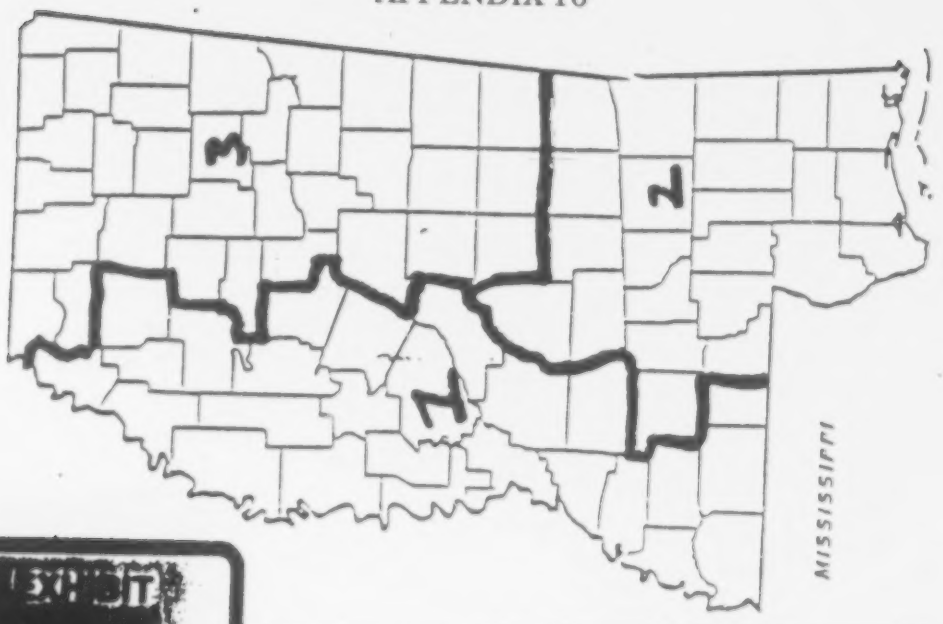
Robert W. King
(Signature of director or treasurer)

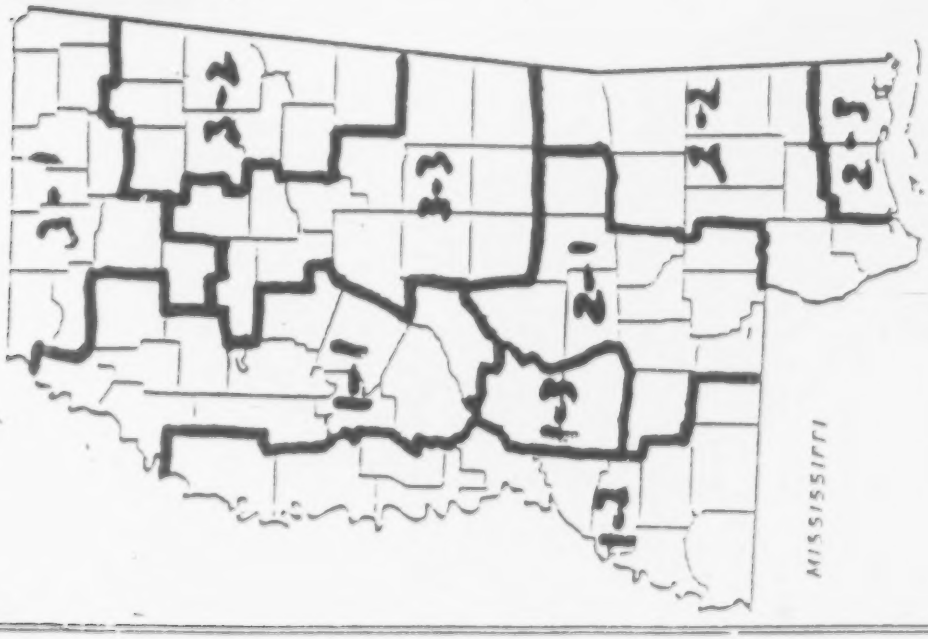
January 10, 1992
(Date)

Authority: Refer to Miss. Code Ann. Sections 23-15-801 1972 et seq. for statutory requirements.
Penalties: Failure to submit required reports, or failure to submit reports in accordance with statutory deadlines, or failure to submit valid reports shall result in prosecution in accordance with Miss. Code Ann. Sections 23-15-811 and -813 (1972).

SS91-2 12/27/90

APPENDIX 16





MISSISSIPPI

MISSISSIPPI

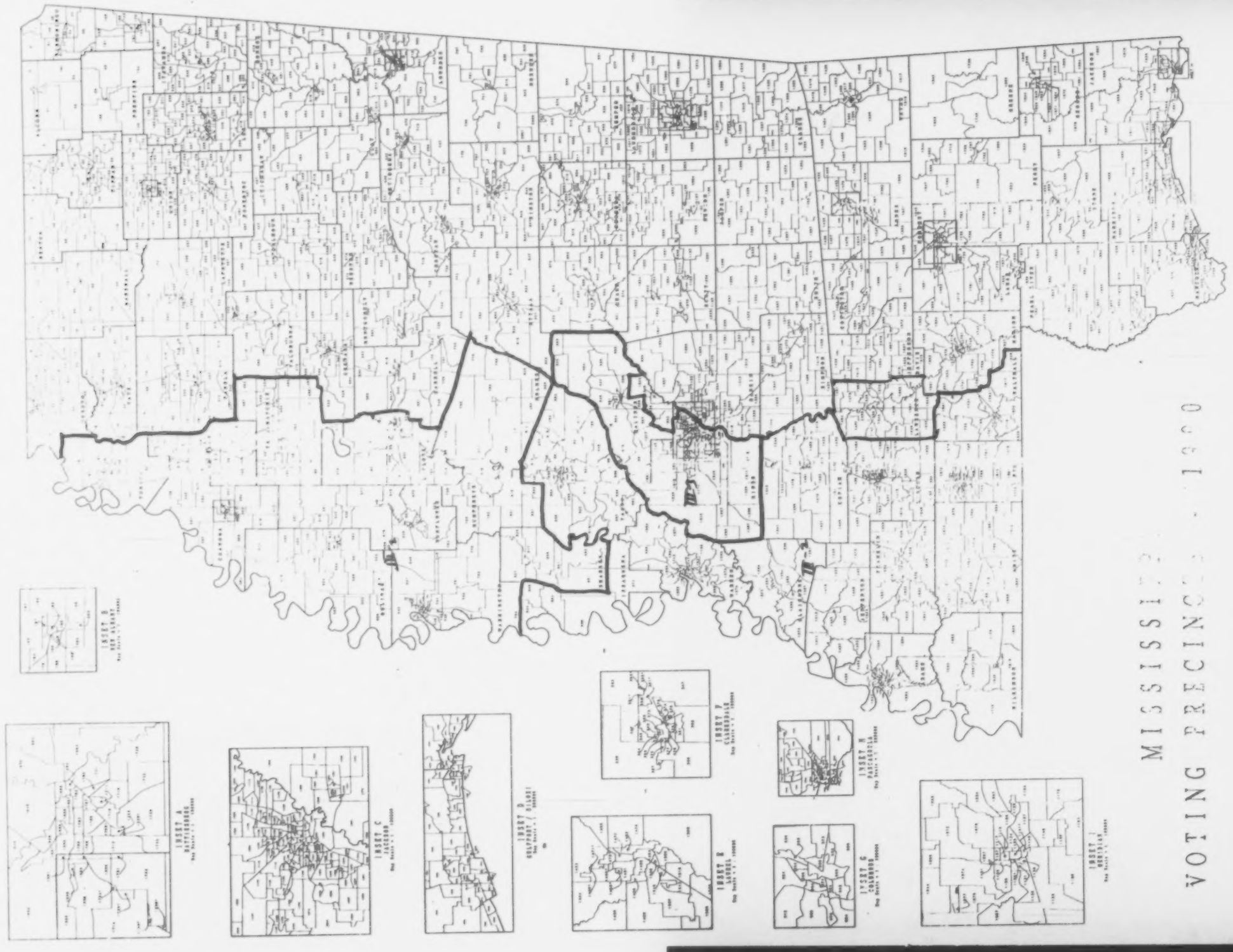
No. 1 STATE SUPREME COURT DISTRICT

... Subdivided 1990 Census Data

County	Total Pop.	Black Pop.
Sub 1		
Adams	35 356	17 212
Amite	13 328	6 038
Bolivar	41 875	26 326
Claiborne	11 370	9 340
Franklin	8 377	3 079
Issaquena	1 909	1 072
Jefferson	8 653	7 462
Pike	36 882	16 843
Sharkey	7 066	4 686
Warren	47 880	18 666
Washington	67 935	39 197
Wilkinson	9 678	6 532
Totals	290 309	156 453
Dev.	+4 396	
Percents	+1.53	53.89
Sub 2		
Carroll	9 237	3 654
Coahoma	31 665	20 454
Holmes	21 604	16 375
HUmphreys	12 134	8 222
Leflore	37 341	22 642
Madison	53 794	23 731
Panola	29 996	14 533
Quitman	10 490	6 193
Sunflower	32 867	21 092
Tallahatchie	15 210	8 881
Tunica	8 164	6 148
Yazoo	25 506	13 443
Totals	288 008	165 368
Dev.	+2 095	
Percents	+0.73	57.41

	Sub 3	
Copiah	27 592	13 920
Hinds	254 441	129 558
Totals	282 033	143 478
Dev.	-3 880	
Percents	-1.35	50.96
District Totals	860 350	465 299
Deviation	+2 611	
Percents	+0.30	54.08

APPENDIX 17



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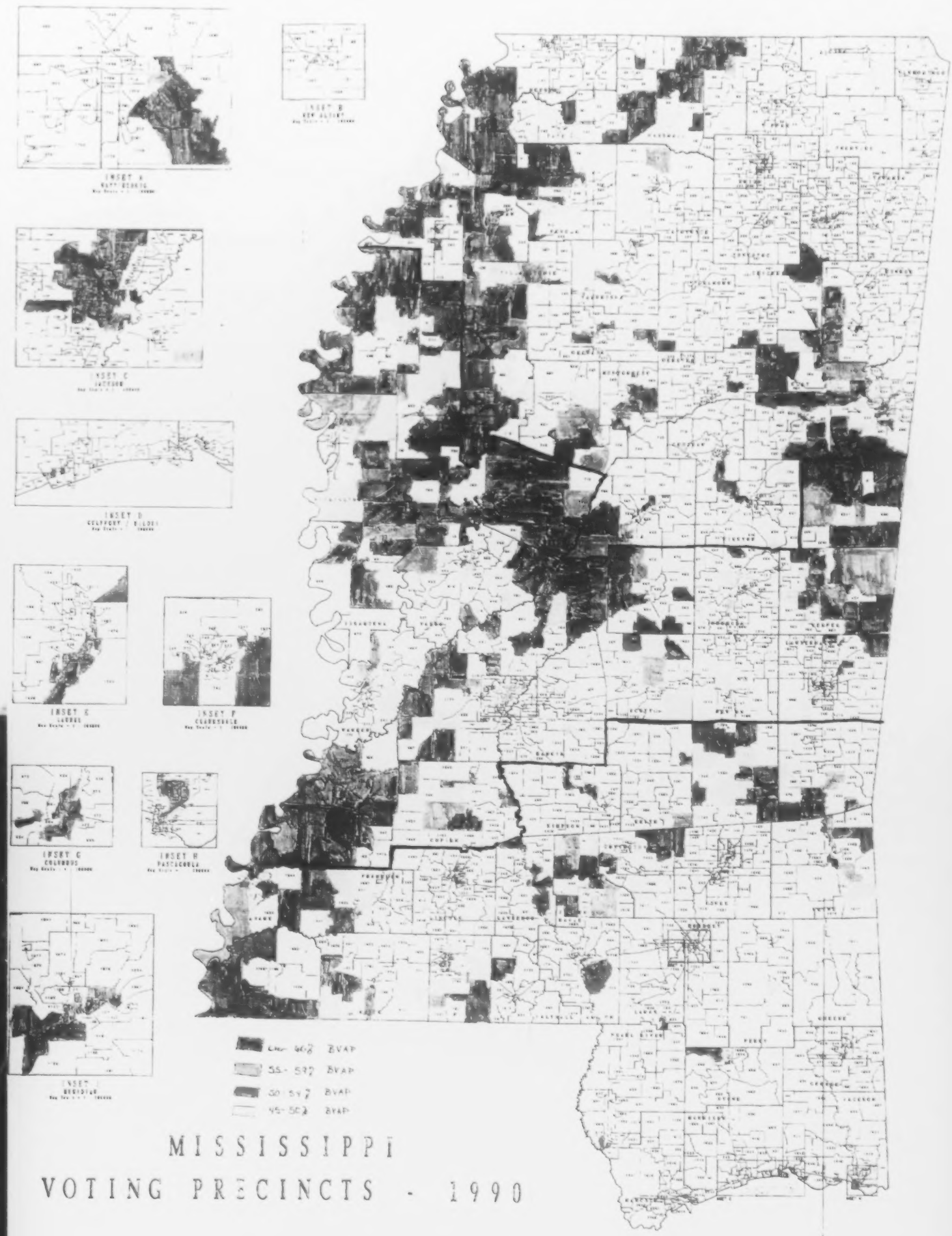
APPENDIX 18



MISSISSIPPI
VOTING PRECINCTS - 1990

MAPSCALE IS 1 500,000 OR APPROXIMATELY 8 MILES PER INCH

DATE PREPARED - DECEMBER 1990

93-647

Supreme Court, U.S.
FILED
OCT - 4 1993
OFFICE OF THE CLERK

NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1993

MAGNOLIA BAR ASSOCIATION, INC., MISSISSIPPI STATE CONFERENCE OF THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, RAINBOW COALITION, THE MISSISSIPPI ASSOCIATION OF BLACK SUPERVISORS, MISSISSIPPI CONFERENCE OF BLACK MAYORS, GEORGE FLAGGS, BENNIE THOMPSON, SHEILA JOHNSON, AND SAM McCRAY,

PETITIONERS

VS.

ARMIS E. HAWKINS, DAN M. LEE, LENORE L. PRATHER, MICHAEL D. SULLIVAN, EDWIN L. PITTMAN, FRED L. BANKS, JR., CHUCK R. McRAE, JAMES L. ROBERTS, JR., AND JAMES W. SMITH, JR., JUSTICES OF THE SUPREME COURT OF THE STATE OF MISSISSIPPI; MIKE MOORE, ATTORNEY GENERAL OF THE STATE OF MISSISSIPPI, KIRK FORDICE, GOVERNOR OF THE STATE OF MISSISSIPPI, AND DICK MOLPUS, SECRETARY OF STATE OF THE STATE OF MISSISSIPPI, MEMBERS OF THE STATE BOARD OF ELECTION COMMISSIONERS; THE MISSISSIPPI REPUBLICAN PARTY EXECUTIVE COMMITTEE; AND THE MISSISSIPPI DEMOCRATIC PARTY EXECUTIVE COMMITTEE,

RESPONDENTS

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

SUPPLEMENTAL APPENDICES

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PRIESTER & RHODES
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*Counsel of Record

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Magnolia Bar Ass'n, Inc. v. Lee, 793 F. Supp. 1386 (S. D. Miss. 1992) 20sa-78sa

APPENDIX 19

MAGNOLIA BAR ASSOCIATION, INC., et al., Plaintiffs-Appellants,

v.

Roy Noble LEE, et al., Defendants-Appellees.

No. 92-7529.

United States Court of Appeals,
Fifth Circuit.

July 9, 1993.

Cite as 994 F. 2d 1143 (5th Cir. 1993)

Various organizations and voters brought action against Mississippi officials, challenging Mississippi's method of electing Supreme Court judges under Voting Rights Act. The United States District Court for the Southern District of Mississippi, William Henry Barbour, Jr., Chief Judge, dismissed complaint, 793 F.Supp. 1386, and plaintiffs appealed. The Court of Appeals, King, Circuit Judge, held that: (1) evidence was sufficient to support finding that there was no significant white bloc voting; (2) evidence was insufficient to establish that election districts with east-west district lines impermissibly fragmented black vote; and (3) finding that there was no significant white bloc voting in Mississippi Supreme Court election district precluded hybrid line-drawing/multi-member challenge.

Affirmed.

1. Elections 12(9.1)

To satisfy threshold inquiry under Voting Rights Act provision prohibiting denial of right to vote on account of race, minority group must prove by preponderance of evidence that it is sufficiently large and geographically

compact to constitute majority in single-member district, its members are politically cohesive, and white majority votes sufficiently as a bloc to enable it, in absence of special circumstances, usually to defeat minority group's preferred candidate. Voting Rights Act of 1965, § 2, as amended, 42 U.S.C.A.
§ 1973.

2. Elections 12(9.1)

Once minority group satisfies threshold inquiry under provision of Voting Rights Act prohibiting denial of right to vote on account of race, it must then offer evidence of circumstances of local political landscape demonstrating that its members have less opportunity than other members of electorate to participate in the political process and elect representatives of their choice. Voting Rights Act of 1965, §§ 2, 2(b), as amended, 42 U.S.C.A. §§ 1973, 1973(b).

3. Elections 12(9.1)

On appeal in action under Voting Rights Act provision prohibiting denial of voting rights on account of race, Court of Appeals reviews district court's findings under clearly erroneous standard; if district court applies correct legal standards, Court of Appeals will not set aside its findings under threshold inquiry, totality of the circumstances inquiry, and ultimate vote dilution inquiry unless it is left with definite and firm conviction that mistake has been committed. Voting Rights Act of 1965, § 2, as amended, 42 U.S.C.A. § 1973.

4. Elections 12(9.1)

Evidence that in two Mississippi Supreme Court elections in which black candidates opposed white candidates, black candidates won while receiving at least 30% of white vote was sufficient to support finding that there was no significant white bloc voting in elections in

that district, as element of claim under Voting Rights Act provision prohibiting denial of right to vote on account of race. Voting Rights Act of 1965, § 2, as amended, 42 U.S.C.A. § 1973.

5. Elections 12(9.1)

District court was not required to rely on expert conclusions in determining whether white bloc voting in Mississippi Supreme Court elections was legally significant or whether elections in which whites did not vote as bloc were aberrational in Voting Rights Act case; rather, district court could examine all election results offered by both sides, as well as circumstances surrounding those elections, and determine for itself, with or without expert conclusions as to which elections were aberrational, whether white majority sufficiently voted as bloc to usually defeat minority-preferred candidate. Voting Rights Act of 1965, § 2, as amended 42 U.S.C.A. § 1973.

6. Elections 12(9.1)

Evidence in Voting Rights Act case challenging Mississippi's method of electing Supreme Court judges was insufficient to establish that election districts with east-west district lines impermissibly fragmented black vote, in view of evidence that blacks would not constitute majority in any proposed north-south multimember districts. Voting Rights Act of 1965, § 2, as amended, 42 U.S.C.A. § 1973.

7. Elections 12(6)

Finding that there was no significant white bloc voting in Mississippi's Central Supreme Court election district precluded hybrid line-drawing/multimember challenge to Mississippi's method of electing Supreme Court judges in which hypothetical Western District would be divided into three proposed subdistricts one of which would have

black majority; permitting use of proposed subdistrict, almost all of which was in existing Central District, would have permitted plaintiffs to circumvent requirement of showing white bloc voting in Central District. Voting Rights Act of 1965, § 2, as amended, 42 U.S.C.A § 1973.

Appeal from the United States District Court for the Southern District of Mississippi

Before POLITZ, Chief Judge, KING, and DUHE, Circuit Judges.

KING, Circuit Judge:

The plaintiffs in this case filed suit against various officials of the State of Mississippi, alleging that Mississippi's current method of electing supreme court judges violates section 2 et seq. of the Voting Rights Act of 1965, 42 U.S.C. § 1973 et seq. The district court rejected the plaintiffs' section 2 claim and dismissed their complaint. The plaintiffs now appeal. For the following reasons, we affirm the decision of the district court.

I. BACKGROUND

The Mississippi Supreme Court is the state's court of last resort in both criminal and civil matters. It currently consists of nine judges who are selected for eight year terms in partisan elections. Vacancies are filled by the Governor, with special elections held for the unexpired term. Candidates for the Mississippi Supreme Court must meet age, residency, and professional qualifications, which are set forth in the Mississippi Constitution. *See* Miss. CONST. art. VI, § 150.

The state of Mississippi is divided into three east-west districts for purposes of electing supreme court judges.

That is, three judges are elected from the Northern District, the Central District, and the Southern District of the state. In each of the three east-west districts, then, Mississippi Supreme Court judges are chosen in at-large, partisan elections.

On August 17, 1990, the Magnolia Bar Association, the Mississippi State Conference of the NAACP, the Rainbow Coalition, the Mississippi Association of Black Supervisors, the Mississippi Conference of Black Mayors, and four black citizens and registered voters of Mississippi (collectively, "Plaintiffs"), filed suit against various state officials (collectively, "Defendants"). The Plaintiffs alleged, among other things, that Mississippi's method of electing supreme court judges violates section 2 of the Voting Rights Act of 1965, 42 U.S.C. § 1973.[1] As a remedy, the Plaintiffs sought single-member election districts, or in the alternative, an election scheme using limited or cumulative voting.

The Plaintiffs' section 2 claim proceeded to trial on February 25,1992. During trial, the Plaintiffs advanced several theories of section 2 liability. First, they presented evidence designed to challenge the current multimember election districts — i.e., evidence suggesting that the multimember election districts, as currently drawn, dilute black voting strength. They also levelled a "vote fragmentation" challenge to the current election scheme, arguing that the current east-west district lines impermissibly fracture black voting strength, which is concentrated in the western segment of Mississippi. Finally, the Plaintiffs offered evidence designed to prove a"hybrid" line-drawing/multimember section 2 claim. Specifically, they presented evidence designed to show that Mississippi's multimember

[1]The Plaintiffs also asserted claims under section 5 of the voting Rights Act, under the Fourteenth and Fifteenth Amendments to the United States Constitution, and under Mississippi law. On September 24, 1991, a three-judge panel granted the Defendants motion for partial summary judgment on the Plaintiffs section 5 claim. And, by pre-trial order, the Plaintiffs voluntarily dismissed all claims except their section 2 claim.

districting scheme, when combined with the east-west districting lines, operates to cancel out or minimize black voting strength.

The district court rejected each of the theories of section 2 liability advanced by the Plaintiffs. *See Magnolia Bar Ass'n v. Lee,* 793 F.Supp. 1386 (S.D.Miss.1992). With regard to the Plaintiffs' straightforward challenge to the current multimember election districts, the court first determined that, in the Northern and Southern Districts, the Plaintiffs had failed to adduce evidence sufficient to satisfy the first threshold requirement of *Thornburg v. Gingles,* 478 U.S. 30, 106 S.Ct. 2752, 92 L.Ed.2d 25 (1986) (i.e., they failed to demonstrate that blacks would constitute a majority of the voting age population in any of the proposed single member districts). See 793 F.Supp. at 1401-02. The court also concluded that, in the Central District, the Plaintiffs had failed to satisfy the third Gingles threshold requirement (i.e., they failed to demonstrate a pattern of legally significant white bloc voting). *See* 793 F. Supp. at 1405-07. As for the Plaintiffs' straightforward vote fragmentation claim, the district court determined that it also failed on the first *Gingles* threshold requirement. The district court specifically concluded that, even if north-south districts were drawn, blacks would not constitute a majority of the voting age population in any of the three proposed multimember districts. *See* 793 F.Supp. at 1414-15. Finally, with respect to the Plaintiffs' hybrid challenge, the district court determined that, although the Plaintiffs had satisfied the *Gingles* threshold requirements, their claim failed under the totality of the circumstances inquiry. *See* 793 F.Supp. at 1415-18.

Ultimately, the district court concluded that the Plaintiffs "failed to prove by a preponderance of the evidence any violation of section 2 of the Voting Rights Act of 1965." 793 F.Supp. at 1418. The district court accordingly entered judgment in favor of the Defendants and dismissed the case. The Plaintiffs now appeal.

II. GOVERNING LEGAL PRINCIPLES

A. The Section 2 Framework

Section 2 of the Voting Rights Act of 1965, as amended, prohibits states and political subdivisions from employing any "voting qualification or prerequisite to voting or standard, practice, or procedure . . . in a manner which results in a denial or abridgment of the right of any citizen of the United States to vote on account of race or color." 42 U.S.C. § 1973(a). Section 2 further provides that

> A violation . .. is established if, based on the totality of the circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of [a protected class] ... in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.

Id. § 1973(b). Finally, section 2 instructs that, although courts should consider "the extent to which members of a protected class have been elected to office in the State or political subdivision," the protected class has no "right to have members .. elected in numbers equal to their proportion in the population." *Id*

It is settled in this circuit that section 2 claims must be analyzed under a two-part framework. To prevail on such a claim, a class of minority voters must first satisfy certain threshold requirements set forth by the Supreme Court in *Thornburg v. Gingles*, 478 U.S. 30, 106 S.Ct. 2752, 92 L.Ed.2d 25 (1986). Minority voters must then offer evidence of the circumstances of the local political landscape — many of which Congress specifically listed in the 1982 amendments to section 2 as being relevant to the inquiry. Ultimately, the *Gingles* threshold inquiry and the broad, totality of circumstances inquiry are designed to probe whether the challenged election practice "has resulted in the denial or abridgement of

the right to vote based on color or race." *Chisom v. Roemer*, ____ U.S. ____ , 111 S.Ct. 2354, 2363, 115 L.Ed.2d 348 (1991).

1. *The Gingles Threshold Inquiry*

[1] The *Gingles* threshold inquiry, which was first formulated in the context of a challenge to a multimember election scheme, is a relatively narrow one. To satisfy it, the minority group must prove by a preponderance of evidence that (1) it is sufficiently large and geographically compact to constitute a majority in a single member district, (2) its members are politically cohesive, and (3) the white majority votes sufficiently as a bloc to enable it — in the absence of special circumstances — usually to defeat the minority group's preferred candidate. *Gingles*, 478 U.S. at 48-51, 106 S.Ct. at 2765-67. Failure to establish any one of the *Gingles* factors precludes a section 2 violation, because "[t]hese circumstances are necessary preconditions for multimember districts to operate to impair minority voters' ability to elect representatives of their choice." *Id.* at 50, 106 S.Ct. at 2766.

Although formulated in the context of a challenge to a multimember election scheme, the *Gingles* threshold inquiry also applies to other types of section 2 claims. In *Growe v. Emison*, ___ U.S. ___ , 113 S.Ct. 1075, 122 L.Ed.2d 388 (1993), a unanimous Supreme Court held that the minority plaintiffs, who were alleging that single-member district lines, as currently drawn, fragmented their voting strength, had to satisfy all three of the *Gingles* threshold requirements. And, in *Voinovich v. Quilter*, ___ U.S. ___ ,113 S.Ct. 1149,122 L.Ed.2d 500 (1993), a case in which the plaintiffs alleged that the existing district lines diluted minority influence over elections, the Supreme Court reiterated that the *Gingles* threshold factors have relevance not only to challenges to multimember districting schemes, but also to other types of section 2 challenges. Writing for a unanimous Court, Justice O'Connor stated:

> Of course, the *Gingles* factors cannot be applied mechanically and without regard to the nature of the claim. For example, the first *Gingles* precondition, the requirement that the group be sufficiently large to constitute a majority in a single district, would have to be modified or eliminated when analyzing the influence-dilution claim we assume *arguendo* to be actionable today. The complaint in such a case is not that black voters have been deprived of the ability to constitute a *majority,* but of the possibility of being a sufficiently large *minority* to elect their candidate of choice with the assistance of cross-over votes from the white majority.

Id. at ___ , 113 S.Ct. at 1157.

2. *The Totality of Circumstances Inquiry*

[2] Once the minority group satisfies the *Gingles* threshold inquiry, it must then offer evidence of the circumstances of the local political landscape — evidence demonstrating that "its members have less opportunity than mother members of the electorate to participate in the political process and elect representatives of their choice." 42 U.S.C. § 1973(b). In the Senate Report accompanying the 1982 amendments to section 2, Congress listed several factors that will typically be relevant to the totality of circumstances inquiry. See S.REP. No. 417, 97th Cong., 2d Sess., at 28-29, (1982), *reprinted* in 1982 U.S.C.A.N. 177, 206-07. These include:

> a. the extent of any history of official discrimination in the state or political subdivision that touched the right of the members of the minority group to register, to vote, or otherwise to participate in the democratic process;
>
> b. the extent to which voting in the elections of the state or political subdivision is racially polarized;
>
> c. the extent to which the state or political subdivision

has used unusually large election districts, majority vote requirements, anti-single shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group;

d. whether members of the minority group have been denied access to [any candidate slating] process;

e. the extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process;

f. whether political campaigns have been characterized by overt or subtle racial appeals; [and]

g. the extent to which members of the minority group have been elected to public office in the jurisdiction.

Id. at 28-29, 1982 U.S.C.A.N. at 207 (footnotes omitted). In the same report, Congress also listed two "[a]dditional factors that in some cases have had probative value . . . to establish a violation." Id. at 29, 1982 U.S.C.A.N. at 207. They are:

h. whether there is a significant lack of responsiveness on the part of elected officials to the particularized needs of the members of the minority group; [and]

i. whether the policy underlying the state or political subdivision's use of such voting qualification, prerequisite to voting, or standard, practice or procedure is tenuous.

Id at 29, 1982 U.S.C.A.N. at 207. Finally, Congress noted that, "[w]hile these enumerated factors will often be the most relevant ones, in some cases other factors will be indicative of the alleged dilution." *Id.*, 1982 U.S.C.A.N.

at 207.

Ultimately, a district court can find a section 2 violation only if, "in the particular situation, the [challenged] practice operate[s] to deny the minority plaintiff[s] an equal opportunity to participate [in the political process] and to elect candidates of their choice." *Id.* at 30, 1982 U.S.C.A.N. at 207. The Senate Report instructs courts not to become bogged down in "mechanical 'point counting'," *id.* at 29 n. 118, 1982 U.S.C.A.N. at 207 n. 118, but rather, to make a "searching practical evaluation of the [locality's] 'past and present reality,'" id. at 30, 1982 U.S.C.A.N. at 208. "[T]here is no requirement that any particular number of [the Senate] factors be proved, or that a majority of them point one way or another." *Id.* at 29, 1982 U.S.C.A.N. at 207.

B. Standard of Appellate Review

[3] Because a district court's findings in a section 2 case are "peculiarly dependent upon the facts of each case" and require "an intensely local appraisal of the design and impact of the contested electoral mechanisms," we review those findings under the clearly erroneous standard of review. *See Gingles,* 478 U.S. at 79, 106 S.Ct. at 2781. If the district court applies the correct legal standards, we will not set aside its findings under the Gingles threshold inquiry, the totality of circumstances inquiry, and the ultimate vote dilution inquiry unless we are "left with the definite and firm conviction that a mistake has been committed." *Anderson v. City of Bessemer City*, 470 U.S. 564, 573, 105 S.Ct. 1504, 1511, 84 L.Ed.2d 518 (1985). That is, "[i]f the district court's account of the evidence is plausible in light of the record viewed in its entirety," its findings will not be reversed. *Id.* at 573-74, 105 S.Ct. at 1511-12.

III. ANALYSIS

The outcome of this appeal turns on the district court's application of the *Gingles* threshold requirements. As explained below, the district court did not clearly err in finding that the Plaintiffs failed to demonstrate legally significant white bloc voting in supreme court elections in the Mississippi Central District. Nor did the district court clearly err in finding that, if the district lines were drawn from north to south rather than from east to west, blacks would not constitute a majority of the voting age population in any of the hypothetical multimember districts. These two findings under the *Gingles* threshold inquiry effectively foreclose the Plaintiffs' straight forward challenges to the current multimember districts and the current district lines, as well as the Plaintiffs' hybrid line-drawing/multimember challenge. Accordingly, we do not reach the Plaintiffs' arguments with respect to the district court's findings under the totality of circumstances inquiry.[2]

2. In particular, we do not reach the Plaintiffs' arguments that (a) the district court erred in failing to discuss relevant contrary evidence on three critical factors under the totality of circumstances inquiry; (b) the district court erred in finding that "the extent to which black citizens fail to exercise their obligation to vote diminishes the weight to be given the history of official discrimination," 793 F. Supp. at 1408; (c) the district court erred when, considering minority electoral success, he took into account the "considerable electoral success ... [which was, in part,] attributable to the voting Rights Act and the Mississippi litigation under it," 793 F.Supp. at 1410; (d) the district court erred in finding that the state policies for maintaining the current east-west, multimember districts are not tenuous; and (e) the district court erred in concluding that the state policies for maintaining the present district lines foreclose the Plaintiffs' section 2 challenges. Of course, by refusing to reach these arguments, we do not mean to express our approval of the particular actions and conclusions about which the Plaintiffs complain.

In this regard, we also deny the Plaintiffs' motion requesting us to take judicial notice of the fact that the Mississippi legislature has enacted a law which establishes an intermediate appellate court. This request was made in connection with the Plaintiffs' argument that the district court erred in assessing the weight of the state interests underlying the current electoral system. Because we are not addressing this argument, there is no need to take judicial notice of a statute which possibly calls into question the strength of Mississippi's interest in the current electoral scheme.

A. The Straightforward Multimember District Challenge

[4] The district court first rejected the Plaintiffs' straightforward challenge to Mississippi's current multimember districting scheme. With respect the Northern and Southern Districts of Mississippi, the district court determined that the Plaintiffs could not satisfy the first *Gingles* threshold factor. That is, they could not draw a single-member district in either of these areas in which blacks would constitute a majority of the voting age population. And, with respect to the Central District, the district court found that, although the Plaintiffs satisfied the first two *Gingles* threshold factors, they could not satisfy the third *Gingles* factor — legally significant white bloc voting. In making this finding, the district court relied primarily on the fact that the only two blacks who had run for the Mississippi Supreme Court in the Central District, Judge Anderson in 1986 and Judge Banks in 1991, defeated their white opponents with significant support from white voters. *See* 793 F.Supp. at 1401-1407.

The Plaintiffs argue on appeal that the district court clearly erred in finding no legally significant white bloc voting in the Central District. They argue specifically that the district court clearly erred in finding "that the election of Anderson and the election of Banks to the Mississippi Supreme Court were not aberrational but evidence that whites will not necessarily vote as a bloc for white candidates having black opponents in Mississippi Supreme Court elections so as to 'usually defeat the minority's preferred candidate.'" 793 F.Supp. at 1407 (quoting, *Gingles*, 478 U.S. at 51, 106 S.Ct. at 2767). They contend that the only evidence that the election of these two black judges was not aberrational is the testimony of the Defendants' expert witness, who they contend was not qualified to render such an opinion. The Plaintiffs point instead to the testimony of their expert, Dr. Lichtman, who stated that (a) white bloc voting in the Central District is legally significant and (b) the election of the two black candidates, who were both incumbents, was aberrational. They reason

that, based on his uncontradicted testimony and the evidence of racially divergent voting patterns in other elections,[3] the district court was required to find legally significant white bloc voting in the Central District. We disagree.

[5] The Plaintiffs have not offered any authority, and we can find none, for their assertion that the district court may only rely on expert conclusions in determining whether white bloc voting is legally significant or whether elections in which whites do not vote as a bloc are aberrational. Indeed, it seems entirely reasonable to permit the district court to examine the election results offered by both sides, as well as the circumstances surrounding those elections, and determine for itself — with or without expert conclusions as to which elections are aberrational — whether the white majority votes sufficiently as a bloc so as to *usually* defeat the minority-preferred candidate. The Plaintiffs' argument that the district court was required to accept their expert's conclusion that the election of two black judges to the Mississippi Supreme Court was aberrational is, therefore, without merit.

Although a close call, we think that the district court could reasonably conclude that the election of two black judges from the Central District was not aberrational, but rather, probative evidence that whites would not vote as a bloc so as to usually defeat the preferred supreme court candidate of black voters. Judge Anderson, the black candidate who defeated a known white segregationist in 1986, received 58% of the white vote. Judge Banks, who narrowly defeated a well-known, white chancery judge in 1991, received approximately

3. Dr. Lichtman analyzed three different kinds of election contests pitting black candidates against white candidates: judicial elections throughout the state of Mississippi (including Circuit, Chancery, and Supreme Court elections); elections in the Second Congressional District; and numerous city and county elections. His analyses covered approximately a twenty year period and included a wide range of local, state, and federal offices. His conclusions were based on these studies.

30% of the white vote and virtually unanimous support from blacks. Given this evidence, as well other evidence offered by the Defendants suggesting that black and white voters do not generally prefer different candidates in Mississippi judicial elections, the district court's finding that the election of Anderson and Banks was not aberrational is plausible in light of the record. Therefore, it is not clearly erroneous.

We also reject the Plaintiffs' related argument that the election of Anderson and Banks had to be discounted because of their status as incumbents. We recognize that, in *Gingles*, the Supreme Court stated that incumbency may be a "special circumstance" that explains isolated minority success in a community polarized along racial lines. *See* 478 U.S. at 57, 106 S.Ct. at 2770. The problem with the Plaintiffs' argument is that the district court had valid reasons for not considering the incumbency of the black candidates as a"special circumstance." As already noted, both of the elections were high profile and involved well-known white candidates. Moreover, neither of the two black candidates had been incumbents for very long. Anderson was appointed to the Mississippi Supreme Court in January 1985 and ran for reelection the next year. Banks had to run in a special election less than a year after he was appointed. Had we been sitting as trier of fact, we may well have reached a different conclusion about the weight to be given these two elections; however, it cannot be said that the district court clearly erred in refusing to discount the two Mississippi Supreme Court elections involving black candidates merely because those candidates were incumbents.

Accordingly, we hold that the district court did not clearly err in finding no legally significant white bloc voting in Mississippi Supreme Court elections in the Central District. This court has repeatedly stated that, when statistical evidence is used to establish legally significant white bloc voting, the most probative elections are generally those in which a minority candidate runs against a white candidate. *See, e.g.*,

Westwego Citizens for Better Government v. City of Westwego, 872 F.2d 1201, 1208 n. 7 (5th Cir.1989). It also follows that elections involving the particular office at issue will be more relevant than elections involving other offices. At the time of trial, there were only two supreme court elections in the Central District where a black candidate had opposed a white candidate, and in both of them, the black candidates, who were also the candidates preferred by black voters, received substantial support from white voters and won the elections. In light of this evidence, the district court could reasonably conclude that the Plaintiffs did not meet their burden of "demonstrat[ing] that the white majority votes sufficiently as a bloc to enable it ...*usually* to defeat the minority's preferred candidate." *Gingles*, 478 U.S. at 51, 106 S.Ct. at 2767 (emphasis added).

B. The Straightforward Line-Drawing or Vote Fragmentation Challenge

[6] The district court also rejected the Plaintiffs' straightforward vote fragmentation challenge. It noted that, even if district lines were drawn so as to create three north-south multimember districts, the Plaintiffs would not be able to satisfy the first *Gingles* threshold factor. The district court specifically determined that blacks would not constitute a majority of the voting age population in any of the north-south multimember districts proposed by the Plaintiffs. *See* 793 F. Supp. at 1414-15.

On appeal, the Plaintiffs do not challenge the district court's findings on their straight-forward vote fragmentation challenge. Indeed, the Plaintiffs' own expert on this question, Senator Kirksey, conceded at trial that blacks would not constitute a majority of the voting age population in any of the proposed north-south multimember districts. Even in the proposed Western District, which would contain the greatest concentration of blacks, Senator Kirksey opined that the voting age

population would only be 48-49% black. Therefore, on the record before us, the district court correctly held that the Plaintiffs failed to satisfy the first *Gingles* requirement with respect to their straightforward line-drawing or vote fragmentation challenge.[4]

C. The Hybrid Line-Drawing/Multimember Challenge

[7] Finally, the district court rejected the Plaintiffs' hybrid line-drawing/multimember challenge. In doing so, the district court disagreed with the Defendants' argument that such a claim is not cognizable under section 2. The district court then concluded, however, that even if Mississippi were divided into three north-south districts, and the proposed Western District were further divided into three subdistricts, the Plaintiffs still could not demonstrate a section 2 violation. The district court found that, although the Plaintiffs satisfied all three *Gingles* threshold factors in the proposed Western District, *see* 793 F.Supp. at 14116, their claim failed under the totality of circumstances inquiry. The district court specifically found that Mississippi's "valid state policies"—in maintaining east-west districts and in preserving county lines — foreclosed the Plaintiffs' hybrid claim. *See* 793 F.Supp. at 1417-18.

We affirm the district court's decision to reject the Plaintiffs' hybrid line-drawing/multimember challenge, but on other grounds. In particular, we conclude that the district court, having rejected the Plaintiffs' challenge to the at-large or multimember feature of the Central Supreme Court district, should have rejected the Plaintiffs' hybrid challenge as seeking to circumvent its finding of no legally significant white bloc voting.

4. We note that the Plaintiffs have not alleged an "influence dilution" claim. That is, they have not argued that the current east-west district lines operate to minimize their ability to influence elections. Compare Voinovich, ___ U.S. ___ , 113 S.Ct. at 1157. Rather, the Plaintiffs have consistently maintained that they are being deprived of the ability to constitute a *majority* in a Mississippi Supreme Court district. Therefore, we need not decide today whether an influence dilution claim is cognizable under section 2.

It is important to understand the implications of the Plaintiffs' hybrid challenge in the context of their challenge to the at-large or multimember feature of the current election districts. The hybrid challenge would allow the Plaintiffs to effectively get around their inability to meet the third *Gingles* threshold requirement in the existing Central District, *see supra* Part III.A. — specifically, by using the entire state of Mississippi as the challenged election district in order to demonstrate legally significant white bloc voting.

In our view, the Plaintiffs' inability to show legally significant white bloc voting in the Central District defeats their hybrid challenge. After all, their proposed subdistrict in the hypothetical Western District encompasses almost all of the area in their proposed subdistrict in the existing Central District. Thus, the Plaintiffs are effectively attempting, by casting their claim as a line-drawing challenge, to attack the *multimember* aspect of the existing Central District; however, rather than relying on voting statistics from that district, as required by *Gingles*,[5] the Plaintiffs seek to rely on *statewide* voting statistics to establish legally significant white bloc voting.

Accordingly, we hold that the Plaintiffs cannot obviate their failure of proof on the third *Gingles* factor in the Central District by looking at some hypothetical district — in this case the state as a whole. This is the sort of bootstrapping that section 2 does not permit.[6]

5. According to the Supreme Court's opinion in *Gingles*, the "inquiry into the existence of vote dilution caused by submergence in a multimember district is district specific." 478 U.S. at 59, 106 S.Ct. at 2771.

6. Having held that the Plaintiffs cannot satisfy their burden under the third *Gingles* factor by pointing to voting behavior in a hypothetical district which encompasses the entire state of Mississippi, we need not decide (a) whether minority plaintiffs challenging an existing multimember election district can add seats to the elected body or (b) whether minority plaintiffs challenging the existing district lines can draw extra lines in order to satisfy the first *Gingles* requirement. We recognize that the Seventh Circuit, in *McNeil v. Springfield Park Dist.*, 851 F.2d 937, 946 (7th Cir.1988), *cert denied* 490 U.S. 1031, 109 S.Ct. 1769, 104 L.Ed.2d 204 (1989),

IV. CONCLUSION

The district court did not clearly err in finding that the Plaintiffs failed to satisfy the *Gingles* threshold requirements on their straightforward challenges to the current multimember districts and the current east-west district lines. As for the Plaintiffs' hybrid line-drawing/multimember challenge, we hold that it is an attempt to recast the Plaintiffs' challenge to the existing Central District, an attempt that must fail under the third *Gingles* factor. We do not reach the Plaintiffs' arguments that the district court erred in assessing the totality of the circumstances. For these reasons, the district court's decision dismissing the Plaintiffs' complaint is AFFIRMED.

held that minority plaintiffs cannot hypothetically expand the elected body to satisfy the first *Gingles* factor. One might argue, however, that the considerations implicated by the first *Gingles* requirement, which specifically contemplates the creation of hypothetical districts, are distinguishable from the considerations implicated by the second and third *Gingles* requirements — both of which require, in the context of a challenge to the at-large aspect of an election scheme, a district-specific analysis of voting behavior. In any event, these questions about hypothesizing more seats or drawing more lines to establish the first *Gingles* requirement are best left for another day.

APPENDIX 20

MAGNOLIA BAR ASSOCIATION, INC. Mississippi State Conference of the National Association for the Advancement of Colored People, Rainbow Coalition, Mississippi Association of Black Supervisors, Mississippi Conference of Black Mayors, George Flaggs, Bennie Thompson, Sheila Johnson, and Sam McCray, on Behalf of Themselves and all others similarly situated, Plaintiffs,

v.

Roy Noble LEE, Dan M. Lee, Armis E. Hawkins, Lenore L. Prather, James L. Robertson, Michael D. Sullivan, Fred L. Banks, Jr., Churck R. McRae, and Edwin Lloyd Pittman, Justices of the Supreme Court of the State of Mississippi; Mike Moore, Attorney General of the State of Mississippi, Ray Mabus, Governor of the State of Mississippi, Dick Molpus, Secretary of State of the State of Mississippi, Members of the State Board of Election Commissioners; the Mississippi Republican Party Executive Committee; and the Mississippi Democratic Party Executive Committee, Defendants.

Civ. A. No. J90-0413(B).

United States District Court,
S. D. Mississippi,
Jackson Division.

July 15, 1992

Cite as 793 F. Supp. 1386 (S. D. Miss. 1992)

MEMORANDUM OPINION AND ORDER

This action is a challenge by Plaintiffs under section 2 of the Voting Rights Act of 1965, 42 U.S.C. § 1973, to the system of electing justices to the Supreme Court of the State of Mississippi. Plaintiffs are the Magnolia Bar Association, Inc., a predominately black bar organization incorporated under the laws of the State of Mississippi; the Mississippi State Conference of the National Association for the Advancement of Colored People, a civil rights organization; the Rainbow Coalition, a civil rights organization; the Mississippi Association of Black Supervisors, an organization of black elected county supervisors; the Mississippi Conference of Black Mayors, an organization of black elected mayors; George Flaggs, an adult black citizen and registered voter in Warren County, Mississippi; Bennie Thompson, an adult black citizen and registered voter in Hinds County, Mississippi; Sheila Johnson, an adult black citizen and registered voter in Adams County, Mississippi; and Sam McCray, an adult black citizen and registered voter in Quitman County, Mississippi. Defendants are the justices of the Supreme Court of the State of Mississippi; Ray Mabus, the Governor of the State of Mississippi,[1] Mike Moore, the Attorney General of the State of Mississippi, and Dick Molpus, the Secretary of State of the State of Mississippi, the members of the Mississippi State Election Commission; the Mississippi Republican Party Executive Committee;[2] and the Mississippi Democratic Party Executive Committee.

Plaintiffs make two distinct challenges in contending that the present supreme court electoral system impermissibly dilutes black voting strength in violation of section 2. First, Plaintiffs challenge the at-large, multimember, numbered post and staggered term

[1]Ray Mabus is no longer the Governor of the State of Mississippi, but the parties have not entered a formal order of substitution.

[2]The Mississippi Republican Party Executive Committee was relieved from further pleadings and appearances as a Defendant in this action pursuant to a Consent Order on September 10, 1990.

features of supreme court elections. These features, Plaintiffs contend, dilute black voting strength by subsuming insular black geographical areas into larger majority white voting districts and spacing elections so blacks cannot marshal their most effective electoral effort.

Second, Plaintiffs challenge the east-west district lines which divide the State of Mississippi into three supreme court districts. Plaintiffs contend that the east-west configuration of these lines dilutes black voting strength by dividing the heavily black populated areas on the western side of the state into each of three majority white districts.

A trial was held from February 25, 1992, through February 27, 1992. The Court in making its rulings considers the evidence presented at trial and the evidence received at the hearing on the Motion for Preliminary Injunction held on October 18, 1991.

I. Preliminary Facts and Legal Background

A. Procedural History

In their Complaint, Plaintiffs asserted claims pursuant to section 2 and section 5 of the Voting Rights Act, the fourteenth and fifteenth amendments of the United States Constitution, and Mississippi state law. On September 24, 1991, a three-judge panel constituted to hear Plaintiffs' section 5 claim granted Defendants' Motion for Partial Summary Judgment on that claim.[3]

[3]The section 5 claim did not involve the matters addressed herein. It challenged the creation and implementation of three new appointed positions of Mississippi Supreme Court Magistrates as authorized by Miss. Code Ann. § 9-3-47, (1972), formerly Chapter 363, H.B. 838, Laws of 1990. Three magistrates, all white, had been appointed by the supreme court. Plaintiffs claimed that the magistrates had judicial functions, that Miss. Code Ann. § 9-3-47, (1972), formerly Chapter 363, H.B. 838, Laws of 1990, had not been precleared as required by the Voting Rights Act, and, therefore, there had been a section 5 violation. The section 5 challenge was originally the primary emphasis of Plaintiffs' lawsuit.

By pretrial order on February 14, 1992, Plaintiffs voluntarily dismissed all claims except their claims pursuant to section 2.

On October 18, 1991, after a hearing, the Court denied Plaintiffs' Motion for a Preliminary Injunction enjoining the general election for Mississippi Supreme Court Central District, Place No. 2, scheduled for November 5, 1991, and all future elections.

B. Factual Background

1. The Supreme Court of the State of Mississippi

a. Nature, Functions and Duties

The Supreme Court of the State of Mississippi is established by the Mississippi Constitution and is the appellate court of last resort in the state.[4] The Mississippi Constitution provides as follows:

> Section 144. The judicial power of the state shall be vested in a Supreme Court and such other courts as are provided for in this constitution. Miss. Const. art. 6, § 144.

Nine justices comprise the Supreme Court of Mississippi, any five of whom when convened constitute a quorum. *Id.* art. 6, § 145B. The supreme court is a court of general appellate jurisdiction and hears both criminal and civil appeals from the twenty circuit courts and twenty chancery courts in the State. Miss. Code Ann. § 9-3-9 (1972).

The supreme court justice who has served for the "longest time continuously" is the Chief Justice. Miss. Code Ann. § 9-3-11 (1972). The Chief Justice is the

[4]There is no intermediate court of appeals in the judicial system of the State of Mississippi.

administrative head of the Court. The two justices who have served continuously for the next longest time periods are the Senior and Junior Presiding Justices. *Id.* The Court ordinarily decides cases by panels of three. The Chief Justice, Senior Presiding Justice and Junior Presiding Justice preside over the three-justice panels. The composition of these panels varies and is not based upon the three electoral districts. Cases are assigned on a random basis so that individual justices decide cases which originated both within and without their electoral districts.

Supreme court justices must meet certain age, residence and professional criteria, as provided by the Mississippi Constitution.

> No personal [sic] shall be eligible to the office of judge of the Supreme Court who shall not have attained the age of thirty years at the time of his appointment, and who shall not have been a practicing attorney and a citizen of the state for five years immediately preceding such appointment.

Miss. Const. art. 6, § 150.

b. Supreme Court Elections

It is the manner in which Mississippi elects its supreme court justices, however, rather than the actual functions of the supreme court, that forms the crux of the present action. Article 6, Section 145 of the Mississippi Constitution provides in pertinent part as follows:

> The legislature shall divide the state into three Supreme Court districts, and there shall be elected one judge for and from each district by the qualified electors thereof at a time and in the manner provided by law.[5]

[5]Note, however, that vacancies on the supreme court are filled, on an interim basis, by gubernatorial appointment. Miss. Code Ann. § 9-1-103 (1972). If the remainder of the unexpired term is more than nine months, a special election is called. Miss. Code Ann. § 23-15-849 (1972).

Miss. Const. art. 6, § 145. The Mississippi Constitution was subsequently amended to provide for six justices, id. art. 6, § 145A, and then was finally amended to provide for nine justices, which is the number presently on the Court. Id. art. 6, § 145B. Every amendment to the number of justices sitting on the supreme court retained the electoral component. Section 145B now provides in pertinent part as follows:

> The Supreme Court shall consist of nine judges . . . . The additional judges herein provided for shall be selected one for and from each of the supreme court districts in the manner provided for by Section 145A of this Constitution or any amendment thereto.

Id. art. 6, § 145B.

The term of office for justices of the Mississippi Supreme Court is eight years. Id. art. 6, § 149. Candidates for the supreme court are nominated and elected by party affiliation,[6] with elections to be held concurrently with the election of representatives to Congress.[7] Three justices are elected from each of the three districts. District Number Three, or the "Northern District," covers roughly the northern one-third of the state. District Number One, or the "Central District," covers roughly the middle one-third of the state. District

[6]Miss. Code Ann. § 23-15-997 provides as follows: Nominations for candidates for the office of judge of the Supreme Court by any political party shall be made by districts. . . . The general primary election laws shall apply to and govern the nomination of candidates for the office of judge of the Supreme Court insofar as they may be applicable.

[7]Miss. Code Ann. § 23-15-991 provides in pertinent part as follows: . . . Concurrently with the regular election for representatives in Congress, held next preceding the expiration of the term of an incumbent, and likewise each eighth year thereafter, an election shall be held in the Supreme Court district from which such incumbent was elected at which there shall be elected a successor to the incumbent, whose term of office shall thereafter begin on the first Monday in January of the year in which the term of the incumbent he succeeds expires.

number Two, or the "Southern District," covers roughly the southern one-third of the state. Miss. Code Ann. § 9-3-1 (1972). Each supreme court justice is elected individually, as provided for by Miss. Code Ann. § 23-15-993 (1972), which states in pertinent part as follows:

> For the purpose of all elections, including primary elections, each of the nine (9) judgeships shall be considered a separate office. The three (3) offices in each of the three (3) Supreme Court districts shall be designated Position Number 1, Position Number 2 and Position Number 3, and in qualifying for an office as a candidate for any office of judge of the Supreme Court each candidate shall state the position number of the office to which he aspires and both the primary and regular election ballots shall so indicate.

Miss. Code Ann. § 23-15-993 (1972). Justices within a district therefore, do not run for office against each other.

In sum, the Mississippi Supreme Court is comprised of nine justices elected, by party affiliation, to numbered posts for staggered eight-year terms on an at-large basis from three separate multimember districts.

c. Population Within the Three Supreme Court Districts

Plaintiffs in the present action contend that the existing supreme court districts impermissibly dilute black voting strength. Table 1 summarizes 1990 population statistics in the three supreme court districts.

TABLE 1

DISTRICT	Total Pop.	Black Pop.	Black Pop.	Total *VAP	Black *VAP	Black *VAP %
District 3 (Northern)	815,365	264,978	32.50	583,931	166,367	28.49
District 1 (Central)	887,966	414,478	46.68	623,064	263,205	42.24
District 2 (Southern)	869,885	235,601	27.08%	619,462	148,097	23.91%

(* - Voting Age Population)

d. Black Supreme Court Justices

Two blacks, former Justice Reuben V. Anderson and current Justice Fred L. Banks, Jr., have served on the Supreme Court of the State of Mississippi. Former Justice Anderson was appointed to fill a vacancy in Central District, Place No. 2 by former Governor William Allain in January 1985, thus becoming the first black justice of the Supreme Court of the State of Mississippi in the twentieth century. Justice Anderson was elected to

to a full term on the supreme court in 1986, and served on the court until he resigned on December 31, 1990. Justice Banks was appointed in January 1991 by former Governor Ray Mabus to fill the unexpired term of former Justice Anderson. Justice Banks was elected to a full term in November 1991. Justice Banks currently serves on the Supreme Court of the State of Mississippi.

C. Legal Background
1. Section 2 of the Voting Rights Act of 1965

The Voting Rights Act of 1965, as amended, 42 U.S.C. § 1973, was enacted to abolish discriminatory voting devices, such as poll taxes and literacy tests, that impeded the participation of black citizens in the political process. Section 2 of the Voting Rights Act, as originally enacted, stated as follows:

> No voting qualification or prerequisite to voting, or standard, or practice, or procedure shall be imposed or applied by any State or political subdivision to deny or abridge the right of any citizen of the United States to vote on account of race or color.

79 Stat. 437.[8]

In *Mobile v. Bolden*, 446 U.S. 55 (1980), the United States Supreme Court held that a violation of section 2 could not be proved absent a showing of intentional discrimination. In holding that the strictures of section 2 and the fifteenth amendment to the United States Constitution were coextensive, Justice Stewart, in his plurality opinion, stated that

> [t]he Fifteenth Amendment does not entail the right to have Negro candidates elected . . . . That Amendment prohibits only purposefully discriminatory denial or abridgment by government of the freedom to vote "on account of race, color, or previous condition of servitude."

Id. at 65, *quoting* U.S. Const. amend. XV.

[8]Congress subsequently amended section 2 in 1975 to include non-English speaking United States citizens within the ambit of the Voting Rights Act. See 42 U.S.C. § 1973.

In 1982, Congress abrogated the "intentional discrimination" requirement set forth in Mobile, and amended section 2 to allow a violation to be proved if a voting practice or procedure "results" in a denial of the right to vote. Section 2 now reads as follows:

> (a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2), as provided in subsection (b) of this section.
>
> (b) A violation of subsection (a) of this section is established if, based on the totality of the circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: *Provided,* That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

42 U.S.C. § 1973. As the Supreme Court recently noted, subsection (a) of section 2 adopts a "results" test which does not require proof of intentional discrimination, and subsection (b) indicates the manner in which the results test should be applied. *Chisom v. Roemer,* ___ U.S. ___ , 115 L.Ed.2d 348, 363 (1991).

2. Application of Section 2 to Judicial Elections

Plaintiffs in the present action, in two distinct challenges, contend that the method of electing supreme court justices in the State of Mississippi, including the district lines used to apportion voters in supreme court elections, violates section 2 of the Voting Rights Act.

This Court has held that section 2 applies to judicial elections. In *Martin v. Allain, ("Martin I")*, 658 F.Supp. 1183 (S.D. Miss. 1987), this Court held that the system of electing circuit, chancery, and county court judges in the State of Mississippi diluted black voting strength in violation of section 2. This Court subsequently held that single-member districts should be adopted to remedy the section 2 violations in certain judicial districts. *Martin v. Mabus, ("Martin II")*, 700 F.Supp. 327 (S.D. Miss. 1988). It had previously been determined that section 5 applied to the election of state court judges. *Kirksey v. Allain*, 635 F.Supp. 347 (S.D. Miss. 1986) (three-judge court).[9]

[9]Section 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. § 1973c, provides that certain states, including Mississippi, with histories of "substantial voting discrimination," South *Carolina v. Katzenbach*, 383 U.S. 301, 329 (1966), must submit changes in a voting practice or procedure to the United States Attorney General or to the United States District Court for the District of Columbia. Section 5 reads in pertinent part as follows:

> Whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title . . . are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting . . . such State or subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title . . . [S]uch qualification, prerequisite, standard, practice, or procedure may be enforced without such proceeding if the qualification, prerequisite, standard, practice or procedure has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission, or upon good cause shown, to facilitate an expedited approval within sixty days after such submission, the Attorney General has affirmatively indicated that such objection will not be made. . .

42 U.S.C. 1973c.

Subsequent to the decisions of this Court in *Martin I* and *Martin II*, however, the United States Court of Appeals for the Fifth Circuit determined that section 2 did not cover judicial elections. In *League of United Latin American Citizens Council No. 4434 v. Clements, ("LULAC")*, 914 F.2d 620 (5th Cir. 1990) (en banc), rev'd, ____ U.S. ____ , 115 L.Ed.2d 379 (1991), the Fifth Circuit held that Louisiana Supreme Court elections were not covered by section 2 because judges were not "representatives" as that term is used in section 2. In reaching its conclusion, the Fifth Circuit stated that "the judiciary serves no representative function whatever: the judge represents no one." *LULAC*, 914 F.2d at 625.

The United States Supreme Court recently settled the question of the applicability of section 2 to judicial elections. In *Chisom*, the Court held that elected judges are, in fact, "representatives" within the meaning of section 2 and that § 2 applies to judicial elections. *Chisom*, ____U.S.____ , 115 L.Ed.2d 348. *Chisom* involved the same Louisiana Supreme Court system for electing judges as was at issue in LULAC.[10] After noting that the Fifth Circuit in *LULAC* correctly stated that judges should ideally administer justice unfettered by public sentiment, *Chisom*, ____ U.S. at ____ , 115 L.Ed.2d at 366, and after noting that Louisiana had chosen to elect rather than appoint supreme court justices, the Court summarized its rationale for applying section 2 to judicial elections:

> The fundamental tension between the ideal character of the judicial office and the real world of electoral politics cannot be resolved by crediting judges with total indifference to the popular will while simultaneously requiring them to run for elected office. When each of several members of a court must be a resident of a separate district, and must be elected by the voters of that district, it seems both reasonable and realistic to characterize the winners as

[10]The Supreme Court granted certiorari in Chisom v. Roemer after the en banc decision of the Fifth Circuit in LULAC.

representatives of that district. . . Louisiana could, of course, exclude its judiciary from the coverage of the Voting Rights Act by changing to a system in which judges are appointed, and in that way, it could enable its judges to be indifferent to popular opinion. The reasons why Louisiana has chosen otherwise are precisely the reasons why it is appropriate for section 2, as well as section 5, of the Voting Rights Act to continue to apply to its judicial elections.

Chisom ___ U.S. at ___, 115 L.Ed.2d at 366-67.

In *Houston Lawyers' Assn. v. Attorney General of Texas*, ___ U.S. , 115 L.Ed.2d 379 (1991), decided on the same day as *Chisom*, the Supreme Court held that section 2 applied to the election of trial judges in the State of Texas. Under *Chisom* and *Houston Lawyers' Ass'n*, therefore, section 2 applies to judicial elections.

3. Standard for Proving a Section 2 Violation

Plaintiffs alleging vote dilution in violation of section 2 must meet the tripartite threshold test set forth by the Supreme Court in *Thornburg v. Gingles*, 478 U.S. 30 (1986). If they satisfy the Thornburg tripartite test, they must then demonstrate that under the "totality of the circumstances" they do not have an equal opportunity to "participate in the political process and elect candidates of their choice." *Thornburg*, 478 U.S. at 44. These inquiries are district-specific where multimember districts are involved. *Id.* at 59 n.28 ("The inquiry into the existence of vote dilution caused by submergence in a multimember district is district-specific"). A court cannot aggregate data from all challenged districts and conclude that vote dilution exists in each district. *Id.*

a. Thornburg Tripartite Test

The *Thornburg* tripartite test requires plaintiffs alleging section 2 vote dilution claims resulting from

multimember or gerrymandered[11] districts to show proof of (1) a sufficiently large and geographically compact minority group population; (2) minority political cohesion; and (3) white bloc voting. The rationale for the test, as the Supreme Court noted, is to require plaintiffs to show that their candidates could prevail in an election absent the allegedly dilutive conduct. *Id.* at 48-51.

(1) Sufficiently Large and Geographcally Compact Minority Group Population

Under *Thornburg,* plaintiffs alleging a section 2 violation must first establish that the minority group of which they are members is "sufficiently large and geographically compact" to constitute a numerical majority in a single-member district. Id. at 50. *Accord, Westwego Citizens v. City of Westwego, ("Westwego III"),* 946 F.2d 1109 (5th Cir. 1931); *East Jefferson Coalition v. Parish of Jefferson,* 926 F.2d 487 (5th Cir. 1991); *Brewer v. Ham,,* 876 F.2d 448 (5th Cir. 1989); *Overton v. City of Austin,* 871 F.2d 529 (5th Cir. 1989).

At the outset, the Court notes that Plaintiffs need not establish that the minority group of which they are members would constitute a supermajority within a proposed single-member district. In *Martin II,* the Court

[11] "Gerrymandered" districts are those districts that have been drawn in an unusual or illogical manner to enhance the voting power of a particular candidate or voting bloc at the expense of other individuals or groups who would be elected or help elect the candidates of their choice. Black's Law Dictionary defines "gerrymander" as

> [a] name given to the process of dividing a state or other territory into the authorized civil or political divisions, but with such a geographical arrangement as to accomplish an ulterior or unlawful purpose, as, for instance, to secure a majority for a given political party in districts where the result would be otherwise if they were divided according to obvious natural lines.

Black's Law Dictionary (5th Ed. 1979). Similarly, the Supreme Court has stated that in a "gerrymander" case, plaintiffs claim that the minority group to which they belong "has been split between two or more multimember or single-member districts, with the effect of diluting the potential strength of the minority vote." *Thornburg,* 478 U.S. at 50 n.16.

held that a figure of 60 percent of total population should be used to create trial court subdistricts in the State of Mississippi as a remedy for section 2 violations. *Martin II,* 700 F.Supp. at 333. In creating this remedy, the Court recognized that the Department of Justice has utilized a guideline of 65 percent total black population, or 60 percent total black voting age population, in approving redistricting plans and fashioning remedies under the Voting Rights Act. *Id.* The Department of Justice arrived at the 65 percent figure by augmenting a simple majority population by 5 percent to account for low minority voter registration; by 5 percent to account for low minority voter turnout; and, if total population rather than voting age population is used, by 5 percent to account for minority population younger than age 18. *See Ketchum v. Byrne,* 740 F.2d 1398, 1415 (7th Cir. 1984).

The Supreme Court tacitly approved the use of the 65 percent guideline as an approximate remedial goal for Voting Rights Act violations in *United Jewish Organizations. Inc. v. Carey,* 430 U.S. 144, 164 (1977). In *United Jewish Organizations,* the Court stated that "it was reasonable for the Attorney General to conclude in this case that a substantial nonwhite population majority — in the vicinity of 65% — would be required to achieve a nonwhite majority of eligible voters." *Id.* The reason for the 65 percent guideline, as this Court has held, is to ensure minorities "the opportunity to elect a candidate of their choice." *Martin v. Mabus,* 700 F.Supp. at 333; Ketchum, 740 F.2d at 1415.

The 65 percent guideline, therefore, is a general remedial goal in Voting Rights Act cases that is irrelevant to the first part of the *Thornburg* tripartite threshold test for liability.[12] The guideline, if invoked, is

[12]The Court notes, however, that there is a tension between the *Thornburg* majority threshold requirement and the 65 percent remedial guideline. Proving section 2 liability merely requires a showing that the racial minority group to which plaintiffs belong could constitute a bare majority of the voting age population in a proposed district, but a bare majority district is usually insufficient to allow plaintiffs to elect candidates of their choice. Moreover, a

generally urged upon courts by plaintiffs seeking to establish "safe" districts that will ensure consistent minority electoral success. *See, e.g., Ketchum* 740 F.2d at 1402 (court noted that plaintiffs-appellants requested a "new map which . . . adopts a 65% minority population guideline for remedial purposes, whenever possible."); *Jeffers v. Clinton,* 756 F.Supp. 1195, 1198 (E.D. Ark. 1990) (in fashioning a redistricting plan with approximately 60% black voting age population per district, the court stated that "[o]n a strictly numerical and quantitative view of equality, any district with a BVAP [black voting age population] of 50% or higher would be *per se* lawful. We think the Voting Rights Act means something more than this"). Accordingly, the Court has found no authority for the proposition that the 65 percent guideline can be used to defeat Voting Rights Act claims at the liability stage of proceedings. Courts adhering to the 65 percent requirement do so in attempting to fashion remedies for violations of section 5 and section 2. *See Ketchum,* 740 F.2d. at 1402 (court adhered to guideline in considering aldermanic ward redistricting plan under section 2); *Jeffers,* 756 F.Supp. at 1195 (three-judge panel adhered to guideline in considering plan of apportionment for Arkansas General Assembly); *Hastert v. State Board of Elections,* 777 F. Supp. 634 (N.D. Ill. 1991) (court adhered to guideline in considering congressional redistricting plan). The 65 percent guideline does not factor into a section 2 determination of liability. *See, e.g., Dickinson v. Indiana State Election Board,* 933 F.2d 497, 503 (7th Cir. 1991) ("We have cast doubt on such a [supermajority] requirement *as a threshold* . . . . The court may consider, at the *remedial* stage, what type of remedy is possible

remedial bare majority district might not be approved by the Department of Justice. In voting rights cases where only a bare majority district can be created, the majority threshold requirement and the supermajority remedial emphasis leave courts in a quandary, and pose difficulties for litigants evaluating the merits of potential section 2 claims. Although this issue is present in this action, a determination of it is not necessary for resolution of Plaintiffs' section 2 claims.

based on the factors traditionally examined in single-member districts, such as minority voter registration and turn-out rates. [citation omitted]. But this difficulty should not impede the judge at the liability stage of the proceedings."); *Neal v. Coleburn*, 689 F.Supp. 1426, 1438 (E.D. Va. 1988) ("Contrary to defendants contention, the general 65% guideline for remedial districts is not a required minimum which the plaintiffs must meet before they can be awarded any relief under section 2 of the Voting Rights Act. Rather, the 65% standard is a flexible and practical guideline to consider in fashioning relief for a section 2 violation.").[13]

It is important to note that, although *Thornburg* does not so expressly require, the Fifth Circuit has interpreted the first part of the tripartite test to require plaintiffs to show a majority of the *voting age* population in a single-member district, as opposed to a majority of the total population. *See Westwego III*, 946 F.2d at 1117 n.7 ("This Court has held that in order to satisfy the first *Gingles* factor, plaintiffs ordinarily must show that members of the minority group constitute a majority of the *voting* age population in a single member district."); *Westwego Citizens v. City of Westwego, ("Westwego II")*, 906 F.2d 1042, 1046 (5th Cir. 1990) ("[A] majority black voting age population in a proposed district [is] generally required to satisfy the first Gingles factor."). Plaintiffs

[13]The Court notes, as an aside, that the Department of Justice has expressly disavowed adherence to a *per se* guideline of 65 percent in redistricting cases. In a letter to United States District Judge George C. Carr of the United States District Court for the Middle District of Florida, then Assistant Attorney General William Bradford Reynolds of the Civil Rights Division of the Department of Justice stated in part as follows:

> There is no 65 percent threshold population figure applied as a rule of thumb by the Department in redistricting matters reviewed under Section 5. . . Accordingly, the Attorney General has frequently concluded, based on the facts presented in a particular submission, that districts containing a minority population significantly less than 65 percent of the total are racially fair districts and that the plan submitted is entitled to Section 5 preclearance.

James v. City of Sarasota, 611 F.Supp. 25, 32-33 (M.D. Fla. 1985).

must be able to show that they have the potential to elect candidates of their choice. As Judge Jones stated in her concurring opinion in *Overton*,

> [t]he need for voting age population data . . . should be obvious. Only voting age persons can vote. It would be a Pyrrhic victory for a court to create a single-member district in which a minority population dominant in absolute, but not in voting age numbers, continued to be defeated at the polls."

Overton, 871 F.2d at 542. (Jones, J., concurring).

Thus, to satisfy the first part of the *Thornburg* tripartite test as interpreted by the Fifth Circuit, plaintiffs must show that the minority group of which they are members could comprise a simple majority of the voting age population in a proposed district. *See Brewer*, 876 F.2d at 452 ("[D]istrict courts may rely on such figures as evidence that the minority's voting age opulation exceeds 50%."). *Accord, Westwego III*, 946 F.2d at 1117, quoting Brewer, 876 F.2d at 452 ("All that must be shown is that 'the minority's voting age population exceeds 50%.").[14] Plaintiffs must show that their minority group constitutes a majority of the voting age population in a geographical area that could be configured as a new single-member district, but is presently part of a larger multimember district in which the plaintiffs' group is a numerical minority, or is split into two or more districts in each of which their group is a numerical minority.

Requiring the minority group to demonstrate that it could comprise a numerical majority of the voting age population in a single-member district is, as stated earlier, another way of requiring the minority group to prove that it possesses the capacity to elect representatives of its choice in the absence of alleged

[14] § 2 merely requires the "potential to elect." *Thornburg*, 478 U.S. at 50 n.17; *Westwego III*, 946 F.2d at 1117 n.9. It does not require a showing of proportional representation at the liability phase, nor does it require proportional representation as a remedy. *Westwego III*, 946 F.2d at 1117 n.9; *Monroe v. City of Woodville*, 881 F.2d 1327, 1329 (5th Cir. 1989); *Brewer*, 876 F.2d at 450.

discrimination. See *Thornburg*, 478 U.S. at 50 n.17. A minority group that is dispersed throughout an existing district cannot claim that a multimember district dilutes its voting strength, because it is the dispersion of the minority group, rather than the multimember district, that accounts for a relative lack of voting strength. *Id.* Similarly, a minority group that is geographically compact but numerically insignificant cannot maintain that a voting practice or procedure dilutes its vote, because the minority group simply lacks the numerical voting strength to elect candidates of its choice. *Id.*

(2) Political Cohesion in the Minority Group Population

The second part of the tripartite *Thornburg* test requires plaintiffs alleging a section 2 violation to show that the minority group of which they are members is "politically cohesive." *Thornburg*, 478 U.S. at 51. *Accord, Westwego III*, 946 F.2d at 1118; *East Jefferson Coalition*, 926 F.2d at 492; *Brewer*, 876 F.2d at 453. As the Supreme Court stated in *Thornburg*,

> [i]f the minority group is not politically cohesive, it cannot be said that the selection of a multimember electoral structure thwarts distinctive minority group interests.

Thornburg, 478 U.S. at 51. The Court did not explicitly define "political cohesiveness," but stated that courts should examine "racially polarized voting" to "ascertain whether minority group members constitute a politically cohesive unit." *Id.* at 56. The Court stated that racially polarized voting exists where there is a "consistent relationship" between voter race and voter choice. Id. at 53 n.21. Plaintiffs, therefore, can prove political cohesiveness by showing "that a significant number of minority group members usually vote for the same candidate." *Id.* at 56. In that regard, a pattern of racial bloc voting over a period of time is "more probative" of political cohesiveness than a single election. *Id.* at 57.

The actual degree of bloc voting necessary to show

political cohesion, however, varies from district to district. *Id.* at 55-56. The Fifth Circuit has held that plaintiffs can demonstrate political cohesion without relying on statistical evidence of racial polarization, although statistical evidence is usually employed to prove political cohesion. See *Westwego III,* 946 F.2d at 1118 n.12; Brewer, 876 F.2d at 453; *Overton,* 871 F.2d at 538. Plaintiffs may demonstrate racially polarized voting by utilizing regression analysis, which measures the strength of the correlation and linear relationship between the variables "r" and "r2" that represent the race of the voter and the candidate supported. See Overton, 871 F.2d at 529; *Campos v. City of Baytown,* 840 F.2d 1240, 1246 (5th Cir. 1988); *Citizens for a Better Gretna v. City of Gretna,* 834 F.2d 496 (5th Cir. 1987). The greater the "r" value the higher is the correlation. The "r" value can range from -1 to 1, with 1 being perfect correlation and -1 being perfect inverse correlation. *See Campos,* 840 F.2d at 1246 n.9. Some courts have based findings of racially polarized voting for "r" values of .8 or higher, although other courts have found an "r" value of .5 to be significant. *See Overton,* 871 F.2d at 544-45 (Jones, J., concurring), *citing, e.g., Campos,* 840 F.2d at 1246 (.8 "r" value as statistically significant), and *Gingles v. Edmisten,* 590 F.Supp. 345, 368 (E.D. N.C. 1984) (noting that correlations above .5 are rare). The significance of "r" values utilized in regression analysis should not be assumed upon a cursory examination, but should be determined only after a thorough explanation of their characteristics and limitations. See Overton, 871 F.2d at 545 (Jones, J., concurring).

Elections that involve both black and white candidates are most probative of racially polarized voting. *See Westwego Citizens for Better Government v. City of Westwego,* 872 F.2d 1201, 1208 n.7 ("Westwego I") (5th Cir. 1989); *East Jefferson Coalition,* 926 F.2d at 493; Campos, 840 F.2d at 1245. The Fifth Circuit has held that a court may limit its investigation of racial polarization to elections involving minority candidates. *See East Jefferson Coalition,* 926 F.2d at 493; *Campos,*

840 F.2d at 1245. Plaintiffs day rely on evidence from "exogenous" elections, or elections involving other offices, to establish racially polarized voting where there is sparse data from "indigenous" elections involving the office in issue. *See Citizens for a Better Gretna,* 834 F.2d at 502. *Accord, Westwego III,* 946 F.2d at 1119 n.15; *East Jefferson Coalition,* 926 F.2d at 493.

(3) Bloc Voting in the White Majority Population

The final part of the tripartite test requires plaintiffs alleging a section 2 violation to demonstrate that the white majority "votes sufficiently as a bloc to enable it . . . usually to defeat the minority's preferred candidate." *Thornburg,* 478 U.S at 51.

Proving white bloc voting is not unlike proving minority political cohesion. Evidence of racial polarity is demonstrative of both. *See Westwego III,* 946 F.2d at 1118. Furthermore, elections involving both white and minority candidates are most probative of white bloc voting. *See East Jefferson Coalition,* 926 F.2d at 493; *Citizens for a Better Gretna,* 834 F.2d at 503. In a manner similar to minority political cohesion, plaintiffs attempting to prove white bloc voting need not rely on statistical evidence, see *Westwego III,* 946 F.2d at 1119 n. 15, but may rely on data from exogenous elections, *see Citizens for a Better Gretna,* 834 F.2d at 502. As the Supreme Court stated in *Thornburg,* "in general, a white bloc vote that will defeat the combined strength of minority support plus white 'crossover' votes rises to the level of legally significant white boc voting." *Thornburg,* 478 U.S. at 56.

b. Totality of the Circumstances

If plaintiffs satisfy the *Thornburg* tripartite test, a court must then consider the "totality of the circumstances" to determine whether the challenged electoral system impedes the ability of plaintiffs to "have an equal opportunity to participate in the political

process and to elect candidates of their choice." *Thornburg*, 478 U.S. at 44. *Accord, Westwego III*, 946 F.2d at 1120; *East Jefferson Coalition*, 926 F.2d at 491. The Supreme Court has stated that, as a general matter, an inquiry into the "totality of the circumstances" requires "a searching practical evaluation of the past and present reality" and a "functional view of the political process." *Thornburg*, 478 U.S. at 45. *Accord, Westwego III*, 946 F.2d at 1120; Westwego I, 872 F.2d 1201, 1204 (5th Cir. 1989).

More specifically, the "totality of the circumstances" inquiry require a court to consider in detail the factors included in the Senate Judiciary Committee Majority Report that accompanied the 1982 amendment to section 2. *Thornburg*, 478 U.S. at 36-38. *Accord, Westwego III*, 946 F.2d at 1120 n.16; *East Jefferson Coalition*, 926 F.2d at 491; *Campos*, 840 F.2d at 1249; *Citizens for a Better Gretna*, 834 F.2d at 498-99. Congress culled these factors from the decision of the Supreme Court in *White v. Regester*, 412 U.S. 755 (1973), and the decision of the Fifth Circuit in *Zimmer v. McKeithen*, 485 F.2d 1297 (5th Cir. 1973) (en banc). The factors include, but are not limited to:

(1) the extent of any history of official discrimination in the state or political subdivision that touched the right of the members of the minority group to register, to vote, or otherwise to participate in the democratic process;

(2) the extent to which voting in the elections of the state or political subdivision is racially polarized;

(3) the extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, anti-single shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group;

(4) if there is a candidate slating process, whether the members of the minority group have been denied access to that process;

(5) the extent to which members of the minority group

in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process;

(6) whether political campaigns have been characterized by overt or subtle racial appeals;

(7) the extent to which members of the minority group have been elected to public office in the jurisdiction.

Additional factors which may be probative include:

(8) whether there is a significant lack of responsiveness on the part of elected officials to the particularized needs of the members of the minority group.

(9) whether the policy underlying the state or political subdivision's use of such voting qualification, prerequisite to voting, or standard, practice or procedure is tenuous.

Thornburg, 478 U.S. at 36-38; *quoting* S.Rep. No. 417, 97th Cong., 2d Sess. 28-29 (1982), *reprinted in* 1982 U.S. Code Cong. & Admin. News 177, 206-07. *Accord, Westwego III,* 946 F.2d at 1120 n.16; *Brewer,* 876 F.2d at 451 n.4. The Supreme Court has stated that the two most important factors to be considered are the extent to which minority group members have been elected to public office in the jurisdiction and the presence of racially polarized voting. See *Thornburg,* 478 U.S. at 48 n.15. *Accord, Westwego III,* 946 F.2d at 1120. In noting their importance, the Supreme Court stated that

> unless minority group members experience substantial difficulty electing representatives of their choice, they cannot prove that a challenged electoral mechanism impairs their ability "to elect." § 2(b). And, where the contested electoral structure is a multimember district, . . . in the absence of significant white bloc voting it cannot be said that the ability of minority voters to elect their chosen representatives is inferior to that of white voters.

Thornburg, 478 U.S. at 44 n.15.

A "totality of the circumstances" inquiry, however, is not limited to a consideration of only those two factors.

The other factors may be relevant. No one of the factors is dispositive, and proof of a majority of the factors is unnecessary for plaintiffs to prevail. *See Westwego III*, 946 F.2d at 1120. *See also East Jefferson Coalition*, 926 F.2d at 494 ("The court need not rule on all of the Senate factors as long as it is satisfied that the totality of the circumstances warrant liability."). A court, therefore, may consider the factors enumerated in the Senate Report accompanying the 1982 amendment to the Voting Rights Act and any other relevant factors in evaluating the "totality of the circumstances" pursuant to a section 2 claim of vote dilution.

II. Findings of Fact and Conclusions of Law

Having set forth the general factual background and law applicable to the present action, the Court now makes its findings of fact and conclusions of law.

Plaintiffs in this action allege that the present system of electing supreme court justices in the State of Mississippi dilutes black voting strength in violation of section 2 of the Voting Rights Act. Plaintiffs make two distinct challenges under section 2. First, Plaintiffs challenge the at-large, multimember, numbered post, and staggered term features of the existing supreme court election system. In addition, Plaintiffs challenge the district lines used to delineate the three existing supreme court election districts.

A. At-large, Multimember District Challenge

The Court will initially address Plaintiffs' challenge to the at-large, multimember aspects of the present system of electing supreme court justices in the State of Mississippi. The Court notes that Plaintiffs included the numbered post and staggered term features of the system in their Complaint, but Plaintiffs' proof focused on the at-large, multimember aspects of the system and did not directly address the numbered post and staggered term features. The Court, therefore, considers

the numbered post and staggered term features only insofar as they are implicated in a discussion of the at-large, multimember features of the supreme court electoral system.

In determining whether the at-large, multimember system, in which three justices in each district are elected for staggered eight-year terms, violates section 2, this Court undertakes its analysis on a district-specific basis, as recognized by the Supreme Court in *Thornburg*. *See Thornburg*, 478 U.S. at 59 n.28. Appendix 1 shows the supreme court districts as they are presently configured.

1. District Two: The Southern District

Supreme Court District Two ("Southern District"), covers roughly the southern one-third of the State of Mississippi. Under the 1990 census, the Southern District has a total population of 869,885, and a total black population of 235,601, or 27.08 percent. *See supra*, Table 1; Defendants' Exhibit 2; Factual Stipulations of the Parties, Paragraph 11. The Southern District has a total voting age population of 619,462, and a total black voting age population of 148,097, or 23.91 percent, under the 1990 census. See supra, Table 1; Defendants' Exhibit 2; Parties' Factual Stipulations, Paragraph 11.

a. Thornburg Tripartite Test

(1) Sufficiently Large and Geographically Compact Black Population

To satisfy the first part of the Thornburg test, Plaintiffs' expert demographer, Henry Kirksey, attempted to create a majority black single-member district by subdividing the existing Southern District into three subdistricts. Plaintiffs' Exhibit 27. Kirksey avoided splitting counties and attempted to attain a subdistrict population deviation of fifteen percent or less.

Using this methodology, Kirksey was unable to create a single-member district in the existing Southern District with a majority black population or a majority

black voting age population. The proposed subdistrict with the highest percentage of eligible black voters, proposed Subdistrict One covering the western segment of the existing Southern District, would have a total black population of 115,764, or 40 percent of the total population of 290,009. There was no proof as to the black voting age population. Kirksey testified that he could create a majority black subdistrict in the existing Southern District if he split counties between subdistricts, but presented no supporting evidence to the Court.

Plaintiffs, therefore, have failed to satisfy the first part of the *Thornburg* tripartite threshold test with respect to the existing Southern District. Accordingly, their section 2 claim challenging the at-large, multimember features of the Mississippi Supreme Court election system as applied to the existing Southern District is without merit and is dismissed.

2. District Three: The Northern District

Supreme Court District Three ("Northern District") covers roughly the northern one-third of the State of Mississippi. Under the 1990 census, the Northern District has a total population of 815,365, with a total black population of 264,978, or 32.50 percent. *See supra*, Table 1; Defendants' Exhibit 2; Parties' Factual Stipulations, Paragraph 12. The Northern District has a total voting age population of 583,931, and a total black voting age population of 166,367, or 28.49 percent, under the 1990 census. *See* Defendants' Exhibit 2; Parties' Factual Stipulations, Paragraph 12.

a. Thornburg Tripartite Test
(1) Sufficiently Large and Geographically Compact Black Population

Plaintiffs' expert demographer Kirksey attempted to create a majority black single-member district by subdividing the existing Northern District into three

subdistricts. Plaintiffs' Exhibit 28. Kirksey avoided splitting counties and attempted to attain a subdistrict population deviation of fifteen percent or less.

Using this methodology, Kirksey was unable to create a single-member district in the existing Northern District with a majority black population or a majority black voting age population. The proposed subdistrict with the highest percentage of eligible black voters, proposed Subdistrict One extending from the western edge of the existing Northern District to the south-central section of the existing Northern District, would have a total black population of 128,427, or 48 percent of the total population of 266,890. Id. There was no proof as to the black voting age population. Kirksey testified that he could create a majority black subdistrict in the existing Northern District if he split counties between subdistricts, but submitted no supporting evidence to the Court.

Plaintiffs, therefore, have failed to satisfy the first part of the tripartite *Thornburg* test with respect to the existing Northern District. Accordingly, their section 2 claim challenging the at-large, multimember features of the Mississippi Supreme Court election system as applied to the existing Northern District is without merit and is dismissed.

3. District One: The Central District

District One ("Central District") covers roughly the middle one-third of the State of Mississippi and includes much of the region known as the Mississippi Delta, and the metropolitan Jackson, Mississippi area.

Under the 1990 census, the Central District has a total population of 887,966, and a total black of population of 414,478, or 46.68 percent. See supra, Table 1; Defendants' Exhibit 2; Parties' Factual Stipulations, Paragraph 10. The Central District has a total voting age population of 623,064, and a total black voting age population of 263,205, or 42.24 percent, under the 1990 census. See Defendants' Exhibit 2; Parties' Factual Stipulations, Paragraph 10.

a. Thornburg Tripartite Test
(1) Sufficiently Large and Geographically Compact Black Population

Plaintiffs' expert demographer Kirksey attempted to create majority black single-member districts by subdividing the existing Central District into three subdistricts. Plaintiffs' Exhibit 26. Kirksey avoided splitting counties and attempted to attain a subdistrict population deviation of fifteen percent or less.

Kirksey created two proposed subdistricts with total black majority populations, one of which, proposed Subdistrict 2, would have a black majority voting age population. Appendix 2 shows Kirksey's proposed subdistricts within the existing Central District. Proposed Subdistrict Two, which encompasses the western, or Delta section of the existing Central District, includes the following counties: Bolivar, Claiborne, Holmes, Humphreys, Issaquena, Jefferson, Sharkey, Sunflower, Warren, Washington and Yazoo. *Id.* Proposed Subdistrict Two would have a total population of 278,799 and a black population of 165,881, or 59.50 percent. Defendants' Exhibit 10. Proposed Subdistrict Two would have a total voting age population of 187,203, with a total black voting age population of 101,570, or 54.26 percent.[15] Defendants' Exhibit 10.

The Court notes an apparent discrepancy between Plaintiffs and Defendants regarding the population deviation in the proposed subdistricts within the existing Central District. Plaintiffs' expert Kirksey testified that Subdistrict One has a total population deviation of -4.7 percent, Subdistrict Two has a total population deviation of -5.8 percent, and Subdistrict Three has a total population deviation of +10.52 percent. Using the percentages given by Kirksey, the total population deviation for the three proposed subdistricts in the

[15]Kirksey testified as to the voting age population percentages, which were not reflected in Plaintiffs' Exhibit 26. Defendants' expert confirmed the accuracy of the percentages. See Defendants' Exhibit 10.

existing Central District is 16.32 percent. Defendants' Exhibit 10, however, lists the population deviation in Plaintiffs' proposed Subdistrict One as -1.36 percent, in Plaintiffs' proposed Subdistrlct Two as -2.49 percent, and in Plaintiffs' proposed Subdistrict Three as +14.42 percent. Defendants' Exhibit 10. Using the percentages in Defendants' Exhibit 10, the total population deviation for the three proposed subdistricts is 16.91 percent.

This Court has previously held that a fifteen percent maximum range of deviation is appropriate in creating judicial subdistricts. *See Martin v. Mabus*, 700 F.Supp. at 335. Therefore, under either Plaintiffs' or Defendants' proof, Plaintiffs have failed to attain a fifteen percent population deviation. The fifteen percent deviation, however, is not a mandatory threshold in section 2 cases. Accordingly, the Court finds that Plaintiffs' failure to attain a fifteen percent deviation does not foreclose their section 2 claim as to the existing Central District.

Plaintiffs have demonstrated that the black population is sufficiently large and geographically compact to constitute a majority of the voting age population in proposed Subdistrict Two in the existing Central District and have therefore satisfied the first part of the *Thornburg* tripartite test.[16]

[16]The Court notes that Plaintiffs' other two proposed subdistricts in the existing Central District do not have majority black voting age populations. Proposed Subdistrict One, which includes only Hinds and Copiah Counties in the existing Central District, would have a total population of 282,033, and a total black population of 143,478, or 50.87 percent. See Plaintiffs' Exhibit 26; Defendants' Exhibit 10. The relevant statistic, however, as the Fifth Circuit has held, is black voting age population. *See, supra*, Section I.C.3.a.(1). The total voting age population in proposed Subdistrict One would be 202,798, with a black voting age population of 94,273, or 46.49 percent. See Defendants' Exhibit 10. Proposed Subdistrict One in the existing Central District, therefore, would not have a majority black voting age population.

Proposed Subdistrict Three, covering the central-eastern section of the existing Central District, would have a total black population of 105,119, or 32.13 percent of the total population, and a total black voting age population of 67,362, or 28.90 percent of the total voting age population. See Plaintiffs' Exhibit 26; Defendants' Exhibit 10. Proposed Subdistrict Three is accordingly well below the requisite black majority voting age population.

(2) Political Cohesion in the Black Population

Having determined that Plaintiffs can create a single-member subdistrict in the existing Central District with a majority black voting age population, the Court must now inquire into the second part of the tripartite *Thornburg* test and determine whether Plaintiffs have demonstrated black political cohesion.

Plaintiffs presented Dr. Allan J. Lichtman by affidavit as an expert witness in the areas of racial bloc voting, minority vote dilution, political systems, and quantitative and socioeconomic analysis. *See* Stipulation of Parties Regarding Plaintiffs' Expert Testimony, Paragraph 1. Dr. Lichtman analyzed local, state, and federal elections in the State of Mississippi involving black and white candidates over a twenty-year period ending in 1992.[17] *Id.*, Paragraph 2. The parties stipulated that Dr. Lichtman used accepted ecological and homogeneous precinct methods and acceptable values for "r" and "r2" linear correlation in performing his analysis. *Id.*, Paragraph 3. *See also Overton*, 871 F.2d at 544-45 (Jones, J., concurring).

Dr. Lichtman found that 70 to 99 percent of black voters voted for black candidates in elections in which black candidates ran against white candidates, and concluded that

[r]esults of the ecological regression analyses show a

[17]Dr. Lichtman analyzed Supreme Court elections and Circuit and Chancery Court elections throughout the State of Mississippi, including elections in the existing Supreme Court Central District. Parties' Stipulations Regarding Plaintiffs' Expert Testimony, Paragraph 2. Dr. Lichtman also analyzed elections in the Second Congressional District in Mississippi, which includes the Mississippi Delta and parts of central Mississippi, and elections in the cities of Cleveland and Jackson in the existing Central District, and elections in the cities of Greenwood and Oxford in the existing Northern District. Finally, Dr. Lichtman analyzed elections in Bolivar County, Hinds County, Madison County, Newton County, and Yazoo County in the existing Central District, and Chickasaw County, Grenada County, Lafayette County and Monroe County in the existing Northern District.

pattern of severe racial polarization in elections held in the State of Mississippi. Analyses results show that black voters are a highly cohesive electorate who invariably support black candidates by substantial majorities.

Id., Paragraph 4.

Defendants contend that blacks are not politically cohesive. In support of their proposition, Defendants introduced the testimony of Kathryn Hester as an expert demographer. Hester analyzed three supreme court elections from the Central District, four supreme court elections from the Southern District, and one supreme court election from the Northern District. *See* Stipulations of Parties Regarding Defendants' Expert, Paragraph 2. Hester also analyzed sixty-six trial court elections throughout the State of Mississippi from 1978 through 1982, id., Paragraph 3, and twelve trial court elections in 1989 and 1990.

Hester specifically relied on data from biracial elections, including the 1991 Supreme Court Central District, Place No. 2 election between black Justice Fred Banks and white challenger W.O. "Chet" Dillard; the 1986 Supreme Court Central District, Place No. 2 election between black former Justice Reuben Anderson and white challenger Richard Barrett; twelve judicial races in 1989 and 1990; and judicial elections studied by Plaintiffs' expert Dr. Lichtman. Both Justice Banks and former Justice Anderson were successful in their electoral efforts, as noted earlier. Hester concluded that blacks are not politically cohesive in judicial elections. In an Eleventh Circuit judicial election between black candidate McDowell and white candidate Pearson, Hester concluded that 40% of blacks voted for the white candidate. In another Eleventh Circuit judicial election between black candidate Morris and white candidate Smith, Hester concluded that 3,000 blacks voted for the white candidate. In a 1978 Eleventh Circuit Chancery Court election between unsuccessful black candidate Smith and successful white candidate Case, Hester concluded that Smith would have won if approximately

3,400 blacks had not voted for the white candidate Case.

Despite Defendants' contentions, the Court finds that there is black political cohesion in the State of Mississippi and in the existing Central District. Dr. Lichtman's expert testimony clearly shows, as this Court previously found in *Martin I*, that blacks overwhelmingly tend to vote for blacks in both judicial and non-judicial elections. *See Martin I*, 658 F.Supp. at 1194. The Court therefore, finds that Plaintiffs have satisfied the second part of the tripartite *Thornburg* test.

(3) Bloc Voting in the White Majority Population

The final part of the tripartite *Thornburg* test requires Plaintiffs to show that the majority white population votes sufficiently as a bloc to enable it to usually defeat the candidate preferred by the minority population. As stated earlier, the inquiry into majority bloc voting is similar to black political cohesion, because both inquiries involve evidence of racially polarized voting.[18]

[18]In their post-trial brief, Defendants contend that the third part of the *Thornburg* tripartite test is of limited application to judicial elections, because "the minority's interest in electing judges is the same as the interest of the majority, *i.e.* electing judges that are fair and impartial and not representative of any particular interest." Defendants' Post-Trial Brief at 25. Defendants contend, in other words, that whites cannot vote as a bloc to defeat the "minority's preferred candidate," because minorities in judicial elections do not "prefer" candidates different from those supported by whites.

Defendants' contention is inherently meritless. The Court assumes without a great leap of faith that people of all races have an interest in electing a "fair and impartial" judiciary. This shared interest, however, does not require a court to ignore majority white bloc voting against minority candidates. Under Defendants' reasoning, a court could never fully consider unanimous white bloc voting in judicial elections because both blacks and whites want "good" judges. This conclusion is unwarranted by the history and purpose of the Voting Rights Act, which was enacted to curb the effects of bloc voting, and by the recent decisions in Chisom and Houston Lawyers' Assn, in which the Supreme Court held that the Voting Rights Act applies to judicial elections. A shared desire by blacks and whites for a sound judicial system does not diminish the need for vigilance to ensure an equal opportunity to participate in the formation of such a system. Defendants' argument is tantamount to a repudiation of the Voting Rights Act and clearly without merit.

Dr. Lichtman relied on data from the same biracial elections that he used in reaching a finding of black political cohesion. Again, the parties stipulated that Dr. Lichtman used accepted and recognized ecological regression and homogeneous precinct methods, and used acceptable values for "r" and "r2". *See* Parties' Stipulation Regarding Plaintiffs' Expert Testimony, Paragraph 3. Dr. Lichtman found that "severe racial polarization" exists in elections held in the State of Mississippi. *Id.*, Paragraph 4. With respect to white bloc voting, Dr. Lichtman found that 70 to 99 percent of whites generally, with some exceptions, vote for white candidates in biracial elections, and concluded that:

> white voters strongly unite behind white candidates, generally providing very little crossover votes for black candidates. This very strong bloc voting by whites would pose a formidable obstacle to black candidates seeking office in districts with a white voting age majority.

Id.

Defendants' expert Hester analyzed information relied on by Dr. Lichtman, including the two supreme court elections involving black candidates, plus twelve biracial judicial elections in 1989 and 1990. Hester found that whites do not always vote as a bloc for white candidates in biracial elections.

Hester relied primarily on the Anderson-Barrett 1986 Supreme Court Central District, Place No. 2 election and the 1991 Banks-Dillard Supreme Court Central District, Place No. 2 election. These are the only two Mississippi Supreme Court elections involving black candidates. In the 1986 Anderson-Barrett election, Anderson, the black candidate and an incumbent justice at the time of the election, received approximately 59,168 votes, or approximately 73 percent of the total vote, compared to 21,467 votes, or approximately 27 percent, for Barrett, the white candidate and an "avowed segregationist." *See* Exhibit A to Motion to Continue of

former Defendant W.O. "Chet" Dillard; *Martin v. Allain*, 658 F.Supp. at 1193. In the Anderson-Barrett

race, Defendants contend, whites did not vote as a bloc for Barrett, the white candidate.

In the 1991 Banks-Dillard election, Banks, the black candidate and an incumbent justice at the time of the election, received 118,122 votes, or approximately 51 percent of the total vote, compared to 111,949 votes, or approximately 49 percent, for the white candidate Dillard. *See* Plaintiffs' Exhibit 36. Dr. Lichtman estimated that Banks received approximately 30 percent of the white vote, combined with nearly unanimous black support. Parties' Stipulation Regarding Plaintiffs' Expert Testimony, Paragraph 6.

Defendants' expert Hester concluded that in the only two supreme court races involving black candidates, the 1986 Anderson-Barrett election and the 1991 Banks-Dillard election, white voters voted for the black candidates in substantial numbers. Hester concluded that these elections disprove the existence of white bloc voting. Hester cited statistics based on data from Dr. Lichtman concerning white voting in majority white precincts from eight counties in the Central District. Hester studied only those counties where voter registration rolls had been purged or where complete re-registration had occurred, and relied on the 1990 census to determine precinct population by race.[19] Hester used turnout rates estimated by Dr. Lichtman. With regard to the Bank-Dillard election, Hester assumed, as did Dr. Lichtman, that Banks received 100 percent of the black vote in these precincts in ascertaining the extent of Banks' white vote.

Hester found that in Hinds County, Banks received over fifty percent of the white vote in two majority white precincts; received over 45 percent of the white vote in three majority white precincts; and received between 30 and 45 percent of the white vote in six majority white precincts. Blacks comprise less than an estimated three

[19]The Fifth Circuit has held that census data is self-reported and unreliable. *See Mississippi State Chapter. Operation PUSH. Inc. v. Mabus*, 932 F.2d 400, 412 (5th Cir. 1991).

percent of the voting age population in these precincts. In Neshoba County, Hester found that Banks received 65 percent of the vote in an all-white precinct; received approximately 55 percent of the white vote in two virtually all-white precincts; and received between 35 and 45 percent of the vote in six all-white precincts. In Bolivar County, Hester found that Banks received 88 percent of the white vote in one precinct; received 56 percent of the white vote in another precinct; and received over 40 percent in another precinct that was virtually all-white. Plaintiffs' expert Dr. Lichtman opined that the Anderson and Banks elections were aberrational. Both Anderson and Banks, Dr. Lichtman noted, were incumbents seeking election who had been appointed by white governors. Dr. Lichtman stated that appointed judicial incumbents have "significant advantages" not available to other black candidates in Mississippi and the South. Parties' Stipulation Regarding Plaintiffs' Expert Testimony, Paragraph 6 (citing experiences in litigation involving the Alabama Supreme Court and Florida Supreme Court).

The Court notes that the power of incumbency can be a mitigating factor of which courts should be cognizant in examining the existence of racially polarized voting. In *Thornburg,* the Supreme Court stated that

> the success of a minority candidate in a particular election does not necessarily prove that the district did not experience racially polarized voting in that election; special circumstances, such as . . . *incumbency* . . . may explain minority success in a polarized con- test.

Thornburg, 478 U.S. at 57 [Emphasis added].

Dr. Lichtman examined elections over a twenty-year period and concluded that 70 to 99 percent of white voters usually support white candidates in biracial elections. In *Thornburg,* the Supreme Court stated that "a pattern of racial bloc voting that extends over a period of time is more probative of a claim that a district experiences legally significant polarization than are the results of a single election." *Thornburg,* 478 U.S. at 57.

The Court further stated that "the fact that racially polarized voting is not present in one or a few individual elections does not necessarily negate the conclusion that the district experiences legally significant bloc voting." *Id.*

Defendants presented proof that the Banks-Dillard contest involved two well-financed candidates, both of whom used extensive television advertisements. Dillard was a sitting chancery judge and a former commissioner of public safety, prosecuting attorney, and assistant attorney general. Banks had substantial and open white support, as did Dillard. Banks had previously been a circuit judge. Thus, this race presented a choice between two experienced judges who were well-known, one of whom was black and the other white. The black candidate won in spite of subtle racial appeals by the white candidate.

The Anderson-Barrett race involved a well-known black former circuit judge and well-known white segregationist. Barrett used overt racial appeals during his campaign. At the end of his first term, Anderson stood for re-election without opposition. Thus, in the two contested races for supreme court seats involving black candidates, the voters knew the race of the candidates and were confronted with racial appeals by the white candidates.

The Court concludes that the election of Anderson and the election of Banks to the Mississippi Supreme Court were not aberrational but evidence that whites will not necessarily vote as a bloc for white candidates having black opponents in Mississippi Supreme Court elections so as to "usually defeat the minority's preferred candidate." *Thornburg,* 478 U.S. at 51. The success of these black men represents, not merely personal triumphs but triumphs for the Voting Rights Act itself.[20]

[20]The Court also notes the election of black Congressman Mike Espy in the Second Congressional District. Congressman Espy initially defeated an incumbent white congressman and has since been re-elected. Even though the district has a black majority, Congressman Espy has had substantial white support since his initial victory in 1986. Congressman Espy's elections were analyzed by Plaintiffs' expert, Dr. Lichtman.

Plaintiffs, therefore, have not satisfied the third prong of the threshold *Thornburg* tripartite test with respect to their claim that the at-large, multimember aspects of the supreme court election system violate section 2 as applied to the existing Central District. Accordingly, their section 2 claim challenging at-large, multimember features of the Mississippi Supreme Court election system as applied to the existing Central District is without merit and is dismissed.

b. Totality of the Circumstances

Because of Plaintiffs' failure to meet the tripartite threshold test of *Thornburg,* it is unnecessary to consider the totality of the circumstances. However, because the Court has heard and considered the evidence and arguments of counsel and because the appellate court might disagree with the conclusions of this Court regarding the *Thornburg* threshold test, the Court will make findings of fact and conclusions of law concerning the totality of the circumstances to determine whether the multimember, at-large, staggered term, numbered post supreme court election system violates section 2 as applied to the existing Central District, under the assumption that the threshold test has been met. The totality of the circumstances inquiry, as stated earlier, considers whether the challenged electoral system impedes the ability of Plaintiffs to "have an equal opportunity to participate in the political process and to elect candidates of their choice." That inquiry requires a consideration of the factors listed in the Senate Majority Report that accompanied the 1982 amendment to section 2. *See, supra,* Section I.c.3.b. The Court considers each factor listed in the Senate Report separately below.

(1) History of Official Discrimination

Prior to the passage of the Voting Rights Act in 1965, the State of Mississippi had a long history of official discrimination that infringed upon the right of black

citizens to vote and participate in the democratic process. This Court has previously taken judicial notice of the history of official discrimination in Mississippi, see *Martin I,* 658 F.Supp. at 1192, and other courts have made similar determinations. *See, e.a., United States v. Mississippi,* 380 U.S. 128, 131-36 (1965).

This history includes the use of poll taxes, literacy tests, and intimidation of black citizens, in addition to more sophisticated forms of discrimination such as at-large elections and majority white election districts.[21] *See, e.q.,* 1955 Miss. Law (Extra Sess.) Ch. 104, *repealed* November 4, 1975 (law requiring potential electors to demonstrate reasonable understanding of the duties and obligations of citizenship under a constitutional form of government . . ."); 1962 Miss. Laws Ch. 569, Sec. 1, *ineffective* 1965 (law requiring potential electors to fill out applications demonstrating their "good moral character"); 1962 Miss. Laws Ch. 573, Sec. 2, *ineffective* 1965 (law which provided a method by which any qualified elector in a county could challenge the "good moral character" of any potential elector"). *See Martin I.* 658 F.Supp. at 1192.

The Court can and does take judicial notice of the past history of official discrimination in the State of Mississippi. The Court also notes, however, that vast changes have occurred in Mississippi since the passage of the Voting Rights Act of 1965. Through bloodshed and perseverance, black citizens overcame official discrimination and secured the right to vote. It is now incumbent upon blacks, in the absence of official discrimination, to exercise that right for which they struggled so mightily. Apathy is not confined to the minority voting age population but is equally pervasive among whites as well, as recent electoral turnout demonstrates. However, in the context of the Voting Rights Act as applied to "present reality," *Thornburg,*

[21]Note, however, that at-large election districts are not *per se* violative of section 2. *See Thornburg,* 478 U.S. at 46; *Brewer,* 876 F.2d at 455.

478 U.S. at 45, the extent to which black citizens fail to exercise their obligation to vote diminishes the weight to be given the history of official discrimination.

(2) Racially Polarized Voting

The Court has already found that there is black political cohesion, and assumes for the purpose of the totality of the circumstances inquiry that there is white majority bloc voting in judicial and non-judicial elections throughout the State of Mississippi, including the existing Central District. The Court therefore reiterates that there is racially polarized voting in the existing Central District and in the State of Mississippi in many elections but not necessarily in biracial election for seats on the Mississippi Supreme Court.

(3) Unusually Large Districts. Majority Vote Requirements, Anti-Single-Shot Provisions, or Other Discriminatory Voting Practices or Procedures

The Court has discussed the size of the existing supreme court election districts. Multimember, at-large districts are not *per se* discriminatory, but, where a majority black voting age population subdistrict can be created within a multimember district, such districts may violate section 2. In the present action, although the Court has found that a majority black single-member district can be created within the existing Central District, the Court cannot say that the supreme court election districts are so "unusually large" that they are *per se* discriminatory against blacks.

The State of Mississippi also has majority vote requirements for party nomination. Although abolition of the majority vote requirement for party nomination might increase the chances for electoral success for black candidates, see *Martin I*, 658 F. Supp. at 1194, a majority vote requirement is not inherently

discriminatory. Mississippi does not have anti-single shot voting provisions.

(4) Candidate Slating Process

There is no candidate slating process in Mississippi.

(5) Socioeconomic Effects of Discrimination

There are substantial socioeconomic disparities between blacks and whites in Mississippi. Dr. Richard Engstrom, Plaintiffs' expert in socioeconomic analysis, political systems, and political participation, testified by affidavit that as of the 1980 census, 47.3 percent of blacks in Mississippi had no more than an elementary school education, compared to 18.3 percent of whites. Parties' Stipulation Regarding Plaintiffs' Expert Testimony, Paragraph 10. Dr. Engstrom testified that only 32.7 percent of blacks in Mississippi had graduated from high school, compared to 63.9 percent of whites. *Id.*

In the area of health, the most significant statistic is the infant mortality rate. In 1982, the Mississippi State Board of Health reported that the infant mortality rate for non-whites in the State of Mississippi was 20.9 per 1,000 live births, compared to 10.4 per 1,000 live births for whites. Parties' Factual Stipulations, Paragraph 26, citing *Mississippi Statistical Abstract,* 1984.

Blacks also trail whites in the area of economic attainment. Dr. Engstrom testified that 55.1 percent of black families in the State of Mississippi had an annual income of less than $10,000, compared to 24.4 percent of whites. Parties' Stipulation Regarding Plaintiffs' Expert Testimony, Paragraph 11. Dr. Engstrom testified that 7.5 percent of black families had an income of $25,000 or more, compared to 26.9 percent of white families. *Id.* According to the 1980 census estimates, 44.4 percent of blacks in Mississippi had incomes below the poverty level, excluding government transfer payments, compared to 12.6 percent of whites. *Id.,* Paragraph 27.

The Court finds that blacks in Mississippi continue to bear the effects of discrimination in critical areas of socioeconomic attainment and this continues in some ways to affect their opportunity to participate in the political process and to elect representatives of their choice. A person with less education is less likely to vote than one with more education. A person with less money is less likely to own an automobile and therefore less likely to make the effort to go to the polls to vote or to the courthouse to register. However, since the passage of the Voting Rights Act of 1965 and the rendition of *White v. Register* and *Zimmer v. McKeithen,* both in 1973, the black population has obtained substantial education regarding voting and the political process. Unfortunately, the socioeconomic standing of blacks vis-a-vis whites has changed little and it is unlikely that standing will improve markedly in the foreseeable future. Accordingly, this Senate Majority Report factor, the socioeconomic effects of discrimination, will be a factor on which the plaintiffs in voting rights cases will always win in the foreseeable future. The issue thus becomes one of weight to be afforded this factor.

(6) Racial Appeals in Political Campaigns

Supreme court and other judicial campaigns in Mississippi have been characterized by overt and subtle racial appeals. For example, in the 1986 Supreme Court Central District, Place No. 2 election, avowed segregationist Barrett relied on overt racial appeals in his unsuccessful attempt to defeat black former Justice Anderson.

Plaintiffs contend that subtle racial appeals characterized the 1991 Supreme Court Central District, Place No. 2 election between Justice Banks, a black, and his white opponent Dillard. Dillard's campaign utilized advertisements and literature that pictured both Dillard and Banks. Plaintiffs contend that the inclusion of Banks' picture was an attempt by Dillard to sway white voters. Bob Owens, a black attorney in Jackson,

Mississippi active in the campaigns of Banks and other blacks running for judicial offices, testified that black candidates in majority white districts in Mississippi avoid emphasizing race in campaign advertising. In the Banks-Dillard election, Owens testified that the Banks campaign deliberately avoided showing Banks' picture in television and print advertisements for fear of alienating white voters. The Court is asked to infer, therefore, that Dillard's inclusion of Banks' picture in Dillard's campaign advertisements and literature constituted a subtle racial appeal to white voters.

Plaintiffs also claim that racial appeals have characterized lower court elections in Mississippi. The Honorable Patricia Wise, a black Chancery Court Judge in Hinds County, Mississippi, testified that she faced racial appeals in her judicial campaign against her white opponent, who distributed a campaign brochure with Wise's picture in an alleged attempt to draw attention to Wise's race. Wise was, nevertheless, elected.

Lillie Blackmon Sanders, a black attorney in Natchez, Mississippi, testified that she faced racial appeals in 1989 and 1990 judicial elections. Sanders was appointed Circuit Judge for the 6th Judicial District in 1989, and ran for election later in the year. Her opponent, Richard Watson, a white, distributed campaign literature to white voters that included a picture of Sanders. Watson defeated Sanders in the election. In 1990, Sanders ran for another judicial office. In the 1990 campaign, her opponent, Rusty Jenkins, a white, substituted his picture for Watson's picture and distributed the same piece of campaign literature to white voters.

From this evidence, the Court finds that subtle and overt racial appeals have characterized some supreme court elections and other judicial elections in Mississippi, although the appeal for voters by both black and white candidates crosses racial lines, thereby minimizing the importance of this factor under the totality of the circumstances.

(7) Minority Electoral Success

Blacks have attained significant electoral success in the State of Mississippi in judicial and non-judicial elections. See Plaintiffs' Exhibit 3. The Court has noted above that two blacks, former Justice Reuben Anderson and current Justice Fred Banks, have been elected to the Mississippi Supreme Court. At the federal level, the Court notes that United States Congressman Mike Espy, who represents the Second Congressional District in Mississippi, is black. In addition, numerous blacks have been elected to judicial offices and non-judicial offices throughout Mississippi. The Court finds, therefore, that blacks have enjoyed considerable electoral success in Mississippi. Much of this success can be directly attributed to the Voting Rights Act and the Mississippi litigation under it.

(8) Lack of Responsiveness to the Particularized Needs of Blacks

Plaintiffs submitted no proof regarding a lack of responsiveness of elected officials, and specifically the justices of the Supreme Court of the State of Mississippi, to the particularized needs of blacks.

(9) Tenuousness of State Policies Underlying Multimember. At-Large Districts

Tenuous, according to Webster ' s *Third New International Dictionary,* means "having little substance or strength" or "not firmly based or supported." Thus, the question addressed by this factor is whether the policies of the State of Mississippi as set forth in its Constitution and statutes regarding the election of its supreme court justices have substance and are firmly based upon or supported by genuine state interests. The Court finds that state policies underlying multimember, at-large supreme court districts are not tenuous. Dr. Westley Busbee, Defendants' expert in the fields of

history and political science, and Chief Justice Roy Noble Lee of the Mississippi Supreme Court, testified that the existing multimember, at-large districts, which have remained unchanged, for the most part, since the Mississippi Constitutional Convention of 1832, foster independence on the supreme court because individual justices are not beholden to the interest of a small geographic area. Under the existing system in which justices run for election from relatively large areas, a justice can theoretically render a decision that is unpopular in a particular area within his or her district without fearing retributive defeat in the next election. Defendants contend that justices would be averse to rendering unpopular decisions if a relatively small area comprised an entire single-member district. Irrespective of the independence of an elected versus an appointed judiciary, the Court finds that multimember, at-large districts, as compared to single member districts, further a valid state policy of preserving independence on the Mississippi Supreme Court.

The Court also notes that there is a valid state policy underlying the staggered term feature of supreme court elections. Chief Justice Lee testified, and the Court agrees, that staggered terms preserve continuity on the Court by preventing the theoretical possibility of all nine justices being defeated in a single election. Continuity, in turn, prevents erratic swings in judicial holdings on the same issues.

Established state policy as reflected by the current method of electing supreme court justices may also be evaluated by examining the alternatives the State of Mississippi has not chosen. This inquiry is ordinarily reserved for the remedy stage in a case such as this, but because the number of alternatives is small, the reasons for existing state policies may be extrapolated from the failure to select those alternatives. Obviously the state could have chosen to elect justices on a statewide basis or to appoint them. Since those are not alternatives Plaintiffs would seek, or that the Court could consider, they will not be discussed further. Since Plaintiffs seek

single-member districts, the possibilities are limited: 1) nine separate districts, one for each justice; 2) leave the Northern and Southern Districts as at-large districts and divide the Central District into (a) three subdistricts, one with a black majority, or (b) one single-member subdistrict with a black majority and one multimember subdistrict from which two posts would be elected at large. The first alternative of nine separate districts would politicize the supreme court more than the present system. Either choice under the second alternative would leave different parts of the state electing justices in different manners and might result in the devaluation of the prestige of the seat or seats elected from subdistricts.

The Court thus concludes that the policies of the State of Mississippi that underlie the existing supreme court electoral system have substance and are firmly based upon and supported by genuine state interests in maintaining an elected supreme court that is insulated as much as possible from political interference in its decision-making process.

Having discussed the Senate Majority Report factors, the Court weighs them under the totality of the circumstances inquiry. That inquiry does not demand a quantitative analysis of those factors, but rather "a searching practical evaluation of the past and present reality." *Thornburg*, 478 U.S. at 79. The past reality for these Plaintiffs and for those they represent was truly harsh. Black people today face harsh realities in their socioeconomic circumstances. However, their political circumstances have changed, drastically since the passage of the Voting Rights Act nearly thirty years ago. The process is not yet complete. The Court under the facts and circumstances presented, however, must conclude that those harsh realities of the past have indeed changed insofar as they related to the election of Mississippi Supreme Court justices.

Of the nine Senate Majority Report factors considered by the Court, the Plaintiff proved only three favoring them: the history of official discrimination, the

socioeconomic effects of discrimination, and the fact of racial appeals in political campaigns. As stated above the Court in this case assigns little weight to these factors. On the other hand, with respect to the two most important Senate Majority Report factors, racially polarized voting and minority electoral success, see *Thornburg*, 478 U.S. at 48, n.15, the Court has found that whites do not vote as a bloc against black candidates in biracial supreme court elections, and has further determined that blacks have had substantial success in elections throughout Mississippi, and have had complete success in electing black candidates to the Mississippi Supreme Court. Also, the Court has found that there is no lack of responsiveness by the supreme court to black litigants and, importantly in this particular case, that the state policies of using the multimember, at-large, staggered term, numbered post election system are not tenuous.

In Houston Lawyers' Assn., the Supreme Court stated that courts may consider state policies in assessing the totality of the circumstances that may preclude a finding of vote dilution. The Court stated that

> the State's interest in maintaining an electoral system . . . is a legitimate factor to be considered by courts among the 'totality of circumstances' in determining whether a section 2 violation has occurred. A State's justification for its electoral system is a proper factor for the courts to assess in a racial vote dilution inquiry . . . [although] that interest does not automatically, and in every case, outweigh proof of racial vote dilution.

Houston Lawyers' Assn., ____ U.S. at ___ , 115 L.Ed 2d at 387. This Court, accordingly, finds that significant weight may be given to legitimate state policies under the totality of the circumstances inquiry.

Mississippi is entitled to elect its judges, and if it does so, it is entitled to have policies which will remove its judges from some political pressures so long as it does not do so in a manner violative of section 2 of the Voting Rights Act. The decision for the Court here is whether

the Plaintiffs have proven a section 2 violation by a preponderance of the evidence under the totality of those circumstances. The Court finds that they have not.

The Court accordingly finds that a weighing of the totality of the circumstances leads to the conclusion that the present multi-member, at-large, staggered term, numbered post election system for seats on the Mississippi Supreme Court does not impede the ability of black voters to have an equal opportunity to participate in the political process and to elect candidates of their choice.

Accordingly, even if the Court has incorrectly found that the Plaintiffs have failed to meet the third part of the *Thornburg* tripartite test regarding the Central District, their section 2 claim challenging the at-large, multimember features of the Mississippi Supreme Court election system as applied to the existing Central District is without merit under the totality of the circumstances evaluation and should be dismissed on that basis as well.

B. District Lines Challenge

Plaintiffs also challenge the district lines which divide the State of Mississippi into three east-west supreme court districts. Plaintiffs contend that the east-west configuration of the lines dilutes black voting strength by dividing the black population on the western side of the state, which includes approximately two-thirds of the blacks in Mississippi according to Plaintiffs' expert Kirksey, into three majority white districts.

Plaintiffs' expert demographer Kirksey attempted to design three new districts extending from north to south, and to design three single-member districts within each new north-south district. Kirksey initially avoided splitting counties, but subsequently proposed a subdistricting plan that split counties between subdistricts. See Plaintiffs' Exhibit 29 and Exhibit 37.

Defendants ask the Court to dismiss Plaintiffs' challenge to the configuration of the existing supreme

court districts because, according to Defendants, Plaintiffs' proposed alternative would create a section 2 violation which does not presently exist under the east-west district lines. Defendants contend that the Court must not disregard the existing district lines. Defendants rely on Judge Jones' concurring opinion in *Overton*, in which she stated that proposed action by the plaintiffs "would create a voting rights violation where none presently existed by enabling [plaintiffs] to meet the necessary preconditions of their Section 2 claim." *Overton*, 871 F.2d at 543, *quoting McNeil v. Springfield Park District*, 851 F.2d 937, 946 (7th Cir. 1988). Defendants reason from Judge Jones' concurrence that Plaintiffs are constrained to proceed within the parameters of the existing supreme court districts. Creating new districts without regard for the existing districts would, Defendants argue, create a voting rights violation where none currently exists.

The Court finds that Defendants' reliance on Judge Jones' concurrence is misplaced, and their argument illogical. Judge Jones' concurrence referred to the plaintiffs' attempt to evade the first part of the *Thornburg* tripartite test by advocating an increase in the number of positions on a city council. Judge Jones stated that "actionable vote dilution must be measured against the number of *positions* in the existing governmental body rather than some hypothetical model. . ." *Overton*, 871 F.2d at 543 [Emphasis added]. To proceed otherwise, as Judge Jones succinctly noted, "puts the cart before the horse." *Id.* In the present action, Plaintiffs do not seek an expansion of the Mississippi Supreme Court from nine justices to a number that would accomplish proportional representation of blacks. Plaintiffs are challenging the way in which the districts are drawn.

Moreover, Defendants misconstrue the types of vote dilution claims properly cognizable under section 2. Minority vote dilution may occur when the minority is subsumed in a larger, multimember district. The Court addressed this type of vote dilution in Section II.A.,

supra, of this Memorandum Opinion and Order. Minority vote dilution may also occur, as Defendants fail to perceive, when a racial minority that would otherwise constitute a numerical majority in a single-member district is "cracked," or "fractured," into two or more larger multimember districts. As the Supreme Court noted in *Thornburg*, "dilution of racial minority group voting strength may be caused by the dispersal of blacks into districts in which they constitute an ineffective minority of voters. . ." *Thornburg*, 478 U.S. at 46 n.11. The Court further noted that, in a vote dilution case, "plaintiffs might allege that the minority group that is sufficiently large and compact to constitute a single-member district has been split between two or more multimember or single-member districts." *Id.* at 50 n.16. *See* e.g., *McGhee v. Granville County*. 860 F.2d 110, 115 n.7 (4th Cir. 1988) ("Districting may dilute racial minority voting power by . . . fracturing."); *Ketchum*, 740 F.2d at 1408 n.8 (7th Cir. 1984) (noting that "fracturing" can result in vote dilution); *Nevett v. Sides*, 571 F.2d 209, 219 (5th Cir. 1978)(court found no distinction between gerrymander and at-large vote dilution claims); *Robinson v. Commissioners*, 505 F.2d 674 (5th Cir. 1974) (court found that apportionment plan impermissibly gerrymandered black voting strength).

As the Supreme Court and other courts have made clear, the Voting Rights Act, contrary to Defendants' argument, applies to racial gerrymandering. Plaintiffs, therefore, are not "creating a violation where none exists" by alleging that a sufficiently large and geographically compact black population has been "fractured" or gerrymandered into two or more areas in which blacks comprise a numerical minority.[22]

[22]In arguing that Plaintiffs could not proceed in derogation of existing district lines, Defendants may have been attempting to rely on language from *Thornburg* pertaining to section 2 "ability to influence" claims. In footnote 12 of *Thornburg*, the Supreme Court stated that it did not consider whether section 2 permitted claims brought by a minority group that was not large enough to constitute a numerical majority in a single-member district but could still influence an election, and, if permissible under section 2, the standard which would apply to such claims. *Thornburg*, 478 U.S. at

Thornburg involved a challenge to multimember, at-large electoral districts and did not expressly hold that the tripartite test should be applied to all section 2 claims. *Thornburg,* however, recognized the validity of other types of vote dilution claims, as discussed earlier in this Memorandum Opinion and Order, and lower courts, accordingly, have applied the tripartite test to claims of fracturing or racial gerrymandering. *See, e.g., Gunn v. Chickasaw County,* 705 F.Supp. 315, 318 (N.D. Miss. 1989) (court held that *Thornburg* tripartite test applied to "fracturing" claims); *Jeffers,* 730 F.Supp. at 204-5 (three-judge panel rejected the argument that *Thornburg* did not apply to "fracturing" claims); *Neal,* 689 F.Supp. at 1435 (court held that *Thornburg* implicitly recognized the application of the tripartite test to "fracturing" claims). *See also East Jefferson Coalition,* 926 F.2d at 491 (court implicitly held that *Thornburg* tripartite test applies to gerry mandering claims); *Jones v. City of Lubbock,* 727 F.2d 364, 370 n.2 (5th Cir. 1984) (court noted in pre-*Thornburg* case that no distinction existed between "gerrymander" and "dilution," multimember cases for analytical purposes). *Thornburg* would have addressed a "fracturing" claim had that claim been appealed. *See Gingles v. Edmisten,* 590

46 n. 12. Courts have struggled with the applicability of *Thornburg* to section 2 "ability to influence" claims, which are not before the Court in the present action. *See Garza v. County of Los Angeles,* 918 F.2d 763, 769 (9th Cir. 1990) (court held that the first part of the *Thornburg* tripartite test applies only where there has been no proof of intentional discrimination); McNeil, 851 F. 2d at 937 (7th Cir. 1988) (court applied *Thornburg* test to bar plaintiffs' ability to influence claim); *Hastert,* 777 F.Supp. at 651, 655 (court refused to limit the first part of the *Thornburg* tripartite test to multimember districts, and rejected plaintiffs' ability to influence claim); *East Jefferson Coalition v. Jefferson Parish,* 691 F.Supp. 991, 1006 (E.D. La. 1988) (court interpreted first part of Thornburg tripartite test to allow plaintiffs' ability to influence claim); *Skorepa v. City of Chula Vista,* 723 F.Supp. 1384, 1392 (S.D. Cal. 1989) (court rejected plaintiffs' ability to influence claim). *See also* Abrams, *"Raising Politics Up": Minority Political Participation and Section 2 of the Voting Rights Act,* 63 N.Y.U.L.Rev. 449, 468 (1988) (stating that the possibility of an "ability to influence" claim "may prove to be *Gingles'* more enduring and problematic legacy.").

F.Supp. 345 (E.D. N.C. 1984) (defendants did not appeal the finding of the district court that a single-member district violated section 2).

The preceding authorities demonstrate the applicability of the *Thornburg* tripartite test to "fracturing" or "gerrymander" cases. The Court, therefore, applies the *Thornburg* tripartite test to Plaintiffs' challenge to the supreme court district lines.

1. Three North-South Districts Without Splitting Counties

Plaintiffs' expert Kirksey designed three new north-south multimember districts without regard to the existing supreme court districts, and without splitting counties. District One encompases the western part of the state, District Two encompasses the southeast part of the state, and District Three encompasses the central and northeast parts of the state. Plaintiffs' Exhibit 29. Kirksey attempted to attain a total population deviation of fifteen percent or less.

In contending that the existing districts improperly dilute black voting strength, Plaintiffs are alleging that a black geographic area that could be configured as an electoral district is presently fractured into two or more majority white electoral districts. Plaintiffs attempted to prove, therefore, that one or more black single-member districts can be created irrespective of the existing supreme court districts.

a. Thornburg Tripartite Test
(1) Sufficiently Large and Geographically Compact Black Population

None of the three proposed multimember districts drawn without splitting counties satisfies the first part of the *Thornburg* tripartite test, which requires a sufficiently large and geographically compact black majority voting age population. District Two has a total population of 853,425, of whom 200,507, or 23.49 percent

are black. *Id.* District Two therefore fails to satisfy the first part of the test. Population totals are unspecified for District Three, but the proposed subdistricts, discussed *infra,* within District Three have black populations well below a majority. District Three therefore fails to satisfy the first part of the test.

District One comes the closest of the three proposed districts to satisfying the first part of the *Thornburg* tripartite test. District One has a total population of 860,350, of whom 465,299, or 54.08 percent are black. *Id.* Plaintiffs' expert Kirksey testified on cross-examination, however, that District One has a total black voting age population of approximately 49 percent. Because voting age population, rather than total population, is the relevant statistic, Plaintiffs have failed to satisfy the first part of the *Thornburg* test with respect to proposed District One.

2. Subdistricts Within the Proposed North-South Districts

Plaintiffs' expert Kirksey attempted to create three new subdistricts within each of the three proposed north-south districts. Plaintiffs' Exhibit 29. Kirksey initially created the subdistricts without splitting counties, and attempted to attain a population deviation of fifteen percent or less. *Id.* On rebuttal, Kirksey offered proof of subdistricts created without regard for county lines. *See* Plaintiffs' Exhibit 37. Appendix 3 shows Kirksey's proposed subdistricts within proposed District One. Appendix 3 does not show subdistricts within proposed Districts Two and Three because Plaintiffs did not prove that they could create majority black subdistricts in Districts Two and Three.

The Court addresses each proposed subdistrict within proposed District One below.

a. Thornburg Tripartite Test
(1) Sufficiently Large and Geographically Compact Black Population

Without splitting counties, Plaintiffs' expert Kirksey was able to create one subdistrict, Subdistrict 1-2, with a majority black voting age population. Plaintiffs' Exhibit 29. Subdistrict 1-2, which includes most of the Mississippi Delta and extends from Bolivar County in the north to the Louisiana state line in the south, has a total population of 288,008, with a total black population of 165,368, or 57.41 percent. *Id.*

Kirksey did not specifically testify as to the voting age population in proposed Subdistrict 1-2. Defendants' expert Hester, however, did not contend that Subdistrict 1-2 had less than a black majority voting age population. Without splitting counties, Hester also created a proposed subdistrict, configured differently than Kirksey's proposed Subdistrict 1-2, with a majority black voting age population of 57.24 percent. *See* Defendants' Exhibit 11, Proposed Subdistrict III-1. Finally, with respect to voting age population, the Fifth Circuit has held that where total black population in a proposed district is "sufficiently large," a court may rely on such figures as evidence of voting age population. *See Westwego III,* 946 F.2d at 1117, n.7; *Brewer,* 876 F.2d at 452; *Westwego II,* 906 F.2d at 1046. Although the Fifth Circuit has expressly refused to adopt a uniform method of determining black voting age population by subtracting five percent from total black population, the Court concludes that Plaintiffs' proposed Subdistrict 1-2 has a black voting age population in excess of 50 percent. Even if this conclusion were erroneous, the Court finds that a black majority subdistrict can be created without splitting counties, as demonstrated by the testimony of Defendants' expert Hester and Defendants' proposed Subdistrict III-1, which has a majority black voting age population. *See* Defendants' Exhibit 11.

Kirksey also attempted to create subdistricts by splitting counties, while still maintaining a population deviation of less than fifteen percent. Plaintiffs' Exhibit 37. Kirksey testified that he could create a second majority black subdistrict by moving the Madison, Ridgeland, Madisonville and Trace Harbor precincts in

Madison County to another subdistrict; by moving Precinct 78, Precinct 46 and Precinct 79 in Hinds County to another subdistrict; and by moving Lawrence County to another subdistrict. Kirksey testified that a subdistrict with a total black population of 54.71 percent and a black voting age population of 50.01 percent could be created after removing these areas.

The Court addresses Plaintiffs' proposed subdistricts drawn without regard for county lines in Section II.B.2.b.(1), infra. At this juncture, it is sufficient that Plaintiffs have shown that a majority black voting age subdistrict may be created without splitting counties and have therefore satisfied the first part of the tripartite *Thornburg* test with respect to their section 2 challenge of the existing supreme court districts.[23]

(2) Political Cohesion in the Black Population

The Court has already determined, from an analysis of judicial and non-judicial elections, that blacks in the State of Mississippi are politically cohesive. See, supra, Section II.A.3.a.(2) and II.A.3.b.(2).

(3) Bloc Voting in the White Majority Population

The Court has previously found in this Memorandum Opinion and Order that whites do not necessarily vote as a bloc in elections involving black and white candidates in the present supreme court Central District. *See,*

[23]In attempting to show the feasibility of a second proposed black majority subdistrict by using split counties, Plaintiffs' expert Kirksey stated that the entire proposed western district using split counties, including the two majority black subdistricts, would have a black voting age population of 50.24 percent. However, Plaintiffs did not urge the Court to adopt three multi-member districts with split counties, and apparently presented such evidence to demonstrate that the standard deviation of the proposed subdistricts was less than fifteen percent. The Court, therefore, will not determine whether a proposed north-south multimember district with split counties would satisfy the *Thornburg* tripartite test and totality of the circumstances inquiry.

supra, Section II.A.3.a.(3). That finding, however, was district specific. The Court was also presented with substantial evidence that whites have voted as a bloc in elections for state trial judges. Accordingly, the Court concludes, contrary to but not inconsistent with its earlier finding, that in regard to the district lines challenge, Plaintiffs have shown by a preponderance of the evidence that whites in Mississippi generally vote as a bloc.

In summary, in regard to their district lines challenge, Plaintiffs have shown that a majority black voting age population single-member district can be created without splitting counties; that blacks are politically cohesive; and that whites vote as a bloc. The Court finds, therefore, that Plaintiffs have satisfied the tripartite *Thornburg* test with respect to their claim that the existing supreme court district lines impermissibly dilute black voting strength.

b. Totality of the Circumstances

Having determined that Plaintiffs have satisfied the *Thornburg* test, the Court now inquires into the totality of the circumstances to determine whether Plaintiffs have established a section 2 claim with respect to their challenge to the existing supreme court district lines.

The Court has previously considered the Senate Majority Report factors with regard to Plaintiffs' challenge to the multimember, at-large features of the supreme court election system. The Court now makes the same findings of fact regarding the Senate Majority Report factors as it did earlier in this Memorandum Opinion and Order, except as to racially polarized voting. The Court makes specific findings below with regard to the state policies that justify the configuration of the existing district lines.

(1) Tenuousness of State Policies Underlying Existing Supreme Court District Lines

The Court finds that there are valid state policies for the existing district lines, and finds that these policies,

when considered under the totality of the circumstances, foreclose Plaintiffs' district lines vote dilution claim.

The Court reiterates that the Supreme Court has stated that courts may give substantial weight to valid state policies in a totality of the circumstances inquiry. *Houston Lawyers' Assn.*, ___ U.S. at ___ , 115 L.Ed.2d at 387. Legitimate state policies may therefore preclude a finding of vote dilution.

Defendants contend that the east-west configuration of the district lines fosters political and economic diversity. The lines, when initially configured in 1832, cut across the sharply divergent interests of the landed aristocracy in the west and the populists in the east. Defendants' expert Dr. Busbee testified that a north-south configuration of the district lines at the time of their creation would have resulted in homogeneous districts lacking political and economic diversity. The east-west configuration of the district lines, which combined diverse political and economic interests, was maintained after the 1890 Constitutional Convention.

The divergence of interests between east and west in present day Mississippi, Defendants contend, is vastly different from what previously existed, but economic and political differences nevertheless persist. Dr. Busbee testified that the interests of the State of Mississippi in having economically and politically diverse supreme court districts would be "reversed" if the lines were reconfigured in a north-south fashion. Dr. Busbee also testified that the lines, which have remained largely unchanged since their original configuration in 1832, were not drawn with racially discriminatory intent, because blacks could not vote at the time that the lines were created.[24] The Court finds that there are valid

[24]The Court notes, of course, that the absence of a discriminatory purpose behind an electoral system is not probative as to whether such a system produces discriminatory results. *See, e.g., Thornburg*, 478 U.S. at 43-44 and n.8 (stating that the Senate and Majority Report which accompanied the 1982 amendments to section 2 rejected the notion that proof of intent was necessary to prevail on a vote dilution claim); *Westwego I*, 872 F.2d at 1210 (noting that the "focal point" of a section 2 inquiry is on discriminatory results, and not on the absence of discriminatory intent at time of adoption of challenged system).

state policies for the east-west configuration of the supreme court district lines.

Furthermore, the Court finds that there is a strong policy in voting rights cases for preserving county lines when creating or proposing new districts. Numerous courts, including this Court, have held that proposed redistricting plans should maintain historical, geographical or political boundaries, and should strive as well for compactness and continuousness. *See, e.g., Marshall v. Edwards,* 582 F.2d 927, 937 (5th Cir. 1978) ("The boundaries should be drawn with an eye to compactness, contiguousness, and the preservation of natural, political, and traditional boundaries."). *Accord, Washington v. Tensas Parish School Board,* 819 F.2d 609, 611 (5th Cir. 1987); *Wyche v. Madison Parish Police Jury ("Wyche II"),* 769 F.2d 265, 268 (5th Cir. 1985); *Wyche v. Madison Parish Police Jury ("Wyche I"),* 635 F.2d 1151, 1163 (5th Cir. 1981); *Parnell v. Rapides Parish School Board,* 563 F.2d 180, 186 (5th Cir. 1977); *Martin v. Mabus,* 700 F.Supp. at 334. Plaintiffs implicitly conceded the viability of this principle during the presentation of their case by proposing only districts drawn without splitting counties, and failing to introduce, until rebuttal, evidence of proposed districts with split counties. The Court finds that Plaintiffs', proposed subdistricts drawn with split counties between subdistricts do not respect county lines as natural political boundaries. Dividing counties between subdistricts as large as those proposed by Plaintiffs would be confusing and burdensome to candidate and voters alike. There is a strong public policy in Mississippi of drawing supreme court districts along county lines and that policy is a valid one.

Moreover, even if the Court were to accept the feasibility of Plaintiffs' proposed subdistricts that utilize split counties, Plaintiffs' second proposed subdistrict has, according to Plaintiff's expert, a black voting age population of only 50.01 percent. This conclusion by Plaintiffs' expert is questioned in light of a black majority of only 54.71% in that proposed sub-district.

This exceedingly slim majority is perhaps non-existent. The Court is mindful that voting age population data should be reliable, and notes that courts should be wary of numerically unstable majorities. *See Overton*, 871 F.2d at 542 (Jones, J., concurring) (noting that in most cases, voting age population is "comfortably over 50 percent."); *Brewer*, 876 F.2d at 451-52 (court could not conclusively determine that a total black subdistrict population of 55.91 percent would have a majority black voting age population). The Court finds that Plaintiffs have failed to prove by a preponderance of the evidence that a second sub-district with a black voting age majority can be created. Accordingly, as a practical matter Plaintiffs would gain nothing from splitting counties in contravention of natural political boundaries.

Defendants have articulated valid policies for preserving the east-west configuration of the existing supreme court districts. Plaintiffs have demonstrated a history of official discrimination, socioeconomic effects of discrimination, and racial appeals in political campaigns, to which the Court will not accord significant weight. See, supra, Section II.A.3.b.(6). The Court finds that the valid state policies, when weighed against the factors on which Plaintiffs have prevailed, foreclose Plaintiffs' section 2 district line challenge.

The Court therefore finds, for the reasons articulated above, that the interests of the State of Mississippi in maintaining east-west supreme court district lines outweigh the other factors under the totality of the circumstances. Plaintiffs' district line challenge pursuant to section 2 is accordingly dismissed.

III. Conclusion

The Court finds that Plaintiffs have failed to prove by a preponderance of the evidence any violation of section 2 of the Voting Rights Act of 1965 and that this case, accordingly, should be finally dismissed. A separate judgment will be entered in accordance with Rule 58 of the Federal Rules of Civil Procedure.

SO ORDERED this the 15th day of July, 1992.

/s/William H. Barbara Jr.
CHIEF JUDGE

No. 93-617

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

MAGNOLIA BAR ASSOCIATION, INC., *et al.*,
Petitioners,

v.

ARMIS E. HAWKINS, CHIEF JUSTICE OF THE SUPREME COURT OF MISSISSIPPI, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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LIST OF ALL PARTIES

The parties to the proceeding below were the petitioners, Magnolia Bar Association, Inc., Mississippi State Conference of the National Association for the Advancement of Colored People, Rainbow Coalition, Mississippi Association of Black Supervisors, Mississippi Conference of Black Mayors, George Flaggs, Bennie Thompson, Sheila Johnson, and Sam McCray, and the respondents, Armis E. Hawkins, Dan M. Lee, Lenore L. Prather, Michael D. Sullivan, Fred L. Banks, Jr., Chuck R. McRae, Edwin Lloyd Pittman, James L. Roberts, Jr., and James W. Smith, Jr., Justices of the Supreme Court of the State of Mississippi, Mike Moore, Attorney General of the State of Mississippi, Kirk Fordice, Governor of the State of Mississippi, Dick Molpus, Secretary of State of the State of Mississippi, and Members of the State Board of Election Commissioners. The Mississippi Republican Party Executive Committee and the Mississippi Democratic Party Executive Committee were dismissed from active participation prior to trial.

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STATUTES

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

No. 93-647

MAGNOLIA BAR ASSOCIATION, INC., *et al.*,
Petitioners,

v.

ARMIS E. HAWKINS, CHIEF JUSTICE OF THE SUPREME COURT OF MISSISSIPPI, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

RESPONDENTS' BRIEF IN OPPOSITION [1]

INTRODUCTION

Respondents, Armis E. Hawkins, Chief Justice of the Supreme Court of Mississippi, et al., respectfully pray that this Court deny petitioners' request that a writ of certiorari issue to review the opinion of the United States Court of Appeals for the Fifth Circuit. That opinion is reported at 994 F.2d 1143 (5th Cir. 1993). It is plainly consistent with the decisions of this Court.

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[1] The respondents are separated into two distinct bodies. The first consists of members of the Mississippi Supreme Court. The second consists of members of the State Election Commission. This pleading represents the position of all respondents herein. The state Republican and Democratic parties were dismissed from active participation prior to trial. The political parties are not respondents herein.

STATEMENT OF THE CASE

The Supreme Court of Mississippi is composed of nine justices elected from three districts. The districts are formed by boundary lines running east and west across the state. The districts are of roughly equal geographic area and include diverse interests of the state. Three justices are elected on an at-large basis from each district. Justices are elected to staggered terms from designated "post" positions. The districts are referred to as the Northern, Southern, and Central Districts. Two black Supreme Court candidates have defeated well known white opponents by receiving substantial white support and votes.

By this Section 2 Voting Rights Act proceeding, the petitioners challenge Mississippi's long established structure of constituting its Supreme Court. Petitioners' original complaint set forth two distinct challenges. The first challenge has generally been labeled the "multimember" claim. Under this claim the plaintiffs challenge the fact that justices are elected on at-large basis from the three districts. The second challenge is generally called the "line" claim. Under this thory the petitioners challenge the fact that the boundary lines are drawn in an east-west configuration. The petitioners sought the establishment of nine single-member districts. As an alternative matter of relief, the petitioners asked the District Court to impose cumulative or limited voting in Supreme Court elections.

The case was tried in the Southern District of Mississippi by Judge William H. Barbour, Jr., who had previously found Section 2 violations in the election of trial judges in certain of the Mississippi chancery and circuit court districts in *Martin v. Allain*, 658 F. Supp. 1183 (S.D. Miss. 1987). The District Court found that petitioners, in their multimember challenge, failed to prove the *Thornburg v. Gingles*, 478 U.S. 30 (1986), preconditions and also failed to satisfy the totality of the circum-

stances test set forth in Section 2, and in *Thornburg*. The District Court also ruled that the petitioners failed in their "line" challenge. The Court found that, even though the petitioners satisfied the *Thornburg* preconditions in the line challenge, under the "totality of the circumstances" test the petitioners failed. The District Court concluded under both challenges that the state's strong interest in electing justices from large and diverse districts which fosters judicial independence, coupled with the absence of white bloc voting in the Central District, together with minority electoral success in Central District races and in Mississippi generally, outweighed the factors petitioners proved under the totality of the circumstances test.

On appeal, the Fifth Circuit ruled that the petitioners had failed to show legally significant white bloc voting in their multimember challenge, and that the District Court did not err in finding that boundary line configurations could not be changed so as to create a black majority voting age population district.[2] The Fifth Circuit interpreted petitioners' challenges as also including a "hybrid" line-drawing/multimember claim. The Fifth Circuit held that this claim was foreclosed by petitioners' failure to prove legally significant white bloc voting in the Central District. Accordingly, the District Court judgment was upheld.

[2] The Fifth Circuit noted that petitioners did not challenge the District Court's findings on this issue. (Supp. App. 16a)

REASONS FOR DENIAL OF THE WRIT

I. THREE OF THE FIVE QUESTIONS PRESENTED IN THE PETITION ARE NOT RAISED BY THE DECISION BELOW OR WERE NOT PRESENTED TO THE FIFTH CIRCUIT FOR DECISION.

The first and second questions presented by petitioners would have this Court decide whether a district court may consider totality of circumstances evidence in determining whether the *Thornburg* preconditions have been met. The fourth question presented by petitioners is whether *total* black population or *voting age* black population is the necessary inquiry in determining the numerosity element in the *Thornburg* preconditions. These three questions were not among the fourteen issues argued to and decided by the Fifth Circuit (Brief App. 1a-3a).[3] In fact, at trial the petitioners argued that voting age population was the relevant inquiry. Petitioners urged the District Court to follow the Seventh Circuit's decision in *Dickerson v. Indiana State Election Board*, 933 F.2d 497, 503 (7th Cir. 1991), which held that a bare majority in black voting age population was sufficient to satisfy the numerosity requirement of *Thornburg*. (Brief, App. 4a) Petitioners seek through their fourth question presented to have this Court review the District Court's conclusion that a new three-judge district having a black voting age majority could not be drawn in a north-south direction. The Fifth Circuit held that petitioners had failed to appeal this finding of the District Court. (Supp. App. 16sa) Likewise, petitioners did not challenge the District Court's findings that black voting age majority subdistricts could not be created in the Northern and Southen Supreme Court Districts (Brief, App. 8a)

This Court held in *Duignan v. United States*, 274 U.S. 195, 200 (1927) "It is only in exceptional cases coming

[3] Citations to (Brief, App.) are to the Appendix to Respondents' Brief in Opposition.

here from the federal courts that questions not pressed or passed upon below are reviewed." Petitioners failed to appeal the issue presented in their fourth question and failed to raise or press the issues presented as their first and second questions. The Fifth Circuit did not pass upon these questions in this case. The Fifth Circuit expressly held "Accordingly, we do not reach the plaintiffs' arguments with respect to the District Court's findings under the totality of circumstances inquiry. (footnote omitted" Supp. App. 12sa)[4] The questions presented in this case are not exceptional.

II. THE TWO QUESTIONS PRESENTED THAT ARE PROPERLY BEFORE THE COURT ARE NOT SUBSTANTIAL QUESTIONS AND DO NOT SET FORTH BROAD LEGAL PRINCIPLES WORTHY OF THIS COURT'S REVIEW.

The petitioners' third and fifth Questions Presented are properly before the Court. The third question is whether the lower courts placed too much emphasis on the fact that in the predominantly white Central Supreme Court District, two black Supreme Court candidates had defeated two well known white opponents. The weight and importance that should be given such a factual circumstance is purely a function of this one proceeding. No broad legal principle could be derived from the peculiarities of this proceeding that could be generally applied to other proceedings. This Court does not exist to correct errors. It exists to create policy that will guide inferior courts. The question of what weight should or should not have been given to a particular piece of evidence in the trial in this cause does not present the Court an opportunity to create or shape policy.

The petitioners' fifth question is whether the Fifth Circuit had the authority to substitute its judgment for

[4] Citations to (Supp. App.) are to the lower court opinions set forth in the Supplemental Appendices to the petition.

the trial court's finding of legally significant white bloc voting in the line challenge aspect of the case. The petitioners view this as a fact question and, therefore, irreversible except upon a finding of clear error. This Court held in *Thornburg* that a district court's finding of fact is not entitled to deference if based on a misunderstanding of the governing rule of law. 478 U.S. at 79. The Fifth Circuit's ruling was a legal one. The Fifth Circuit found as a matter of law that the District Court's examination was not sufficiently district specific. The District Court's findings were, therefore, meaningless rather than necessarily erroneous. The Fifth Circuit merely held that an examination of properly district specific data revealed an absence of legally significant white bloc voting. In any event, the Fifth Circuit's ruling on this point was a legal ruling, and the Fifth Circuit was, of course, under no duty to accord deference to the District Court's ruling on this point.

III. EVEN SHOULD THIS COURT CONSIDER THIS CASE TO BE PROCEDURALLY SUITABLE FOR REVIEW, THE QUESTIONS OF LAW SOUGHT TO BE PRESENTED HAVE BEEN PREVIOUSLY DECIDED BY THIS COURT OR BY UNANIMOUS AGREEMENT AMONG THE CIRCUIT COURTS.

The first issue presented is, as stated above, contained in the first two Questions Presented. The discrete question is whether "totality of the circumstances" proof can be used to decide whether the *Thornburg* preconditions have been met. This question was answered in *Thornburg* where it was stated:

> If difficulty in electing and white bloc voting are not proved, minority voters have not established that the multimember structure interferes with their ability to elect their preferred candidates. Minority voters may be able to prove that they still suffer social and economic effects of past discrimination that appeals to racial bias are employed in election campaigns

> and that a majority vote is required to win a seat, but they have not demonstrated a substantial inability to elect caused by the multimember district. (*Id.*, p. 49, n.15)

This language shows that, in the absence of legally significant white bloc voting, matters which would constitute "totality of circumstances" factors are irrelevant. In effect, the petitioners are asking this Court to overrule *Thornburg*. The petitioners present nothing in their petition which suggests any reason the Court might need to revisit this issue.

Petitioners contend that the Fifth Circuit decision in the instant case is in conflict with the Eleventh Circuit's holding in *Hall v. Holder*, 955 F.2d 1563 (11th Cir. 1992), *cert. granted sub nom. Holder v. Hall*, 61 U.S. L.W. 3596. The narrow holding in *Hall* is limited to situations where election data and derivative statistical information are systematically unavailable. There was no such finding in the instant case. Any conflict between the *Hall* decision and this case has already been resolved by this Court in *Thornburg, supra*. Certiorari was granted in *Holder v. Hall* on March 1, 1993 on an entirely different question. Oral argument was presented in *Holder* on the first day of the October, 1993 term.

It is important to understand that the Fifth Circuit has not embraced a mechanical application of the *Thornburg* preconditions. The Fifth Circuit has already ruled that it is acceptable to use non-expert testimony in establishing racially polarized voting. *Westwego Citizens for Better Gov't v. City of Westwego*, 946 F.2d 1109, 1118 (5th Cir. 1991). Moreover, the Fifth Circuit rejected petitioners' argument in this case that the District Court was required to rely on only expert conclusions. The Fifth Circuit held that the District Court could properly examine the circumstances surrounding the analyzed elections, together with the election results, and determine for itself whether certain elections were aberrational or

whether white voters usually voted to defeat the preferred candidates of minority voters. (Supp. App. 15sa). However, the issue of whether matters which would constitute "totality of circumstances" conditions could also be used to determine the *Thornburg* preconditions was not raised by petitioners. Again, as set forth above, respondents submit that this question has already been decided by *Thornburg*.

The next legal question the petitioners would have this Court consider relates to the relevant inquiry for determining the numerosity component of the *Thornburg* test. The petitioners submit. for the first time, that *total* black population in a proposed district is the proper measure rather than *voting age* black population. As set forth above, the petitioners took a contrary position in the lower courts. In any event, this is not a question which needs decision by this Court. The circuit courts and district courts which have looked at this question are unanimous in the view that the relevant inquiry is voting age black population, *see, Overton v. City of Austin*, 871 F.2d 529 (5th Cir. 1989); *McNeil v. Springfield Park District*, 851 F.2d 937, 944-45 (7th Cir. 1988); *Romero v. City of Pomona*, 883 F.2d 1418 (9th Cir. 1989); *Latino Political Action Committee v. City of Boston*, 609 F. Supp. 739 (D.C. Mass. 1985), *aff'd* 784 F.2d 409 (1st Cir. 1986); *Gingles v. Edmisten*, 590 F. Supp. 345, 381 n.3 (E.D. N.C. 1984), *aff'd in part and rev'd in part sub nom. Thornburg v. Gingles*, 478 U.S. 30 (1986). Any other interpretation would be irrational. The forced creation of a district without a voting age black majority would be ineffective in achieving the goals sought by the Voting Rights Act and would be needlessly destructive of state prerogatives. In view of the petitioners failure to prove the *Thornburg* precondition concerning white bloc voting, any review of this issue would be academic so far as these petitioners are concerned.

The last legal question the petitioners would have this Court review relates to the authority of a circuit court to

substitute its view of the law for the District Court's view of the law. As discussed above, the District Court looked at statewide voting data in attempting to determine whether white bloc voting existed in connection with petitioners' "line" challenge. In *Thornburg, id.* at p. 59, n.28, this Court imposed a requirement of district specificity in analyzing white voting behavior. This Court's decision in *Growe v. Emison*, —— U.S. ——, 113 S.Ct. 1075 (1993), extended the requirements of *Thornburg* to line fragmentation claims. The Fifth Circuit merely and correctly found that the District Court's line challenge analysis improperly relied on non-district specific voting data. The Fifth Circuit looked at properly district specific data and corrected the District Court as a matter of law. The authority of a circuit court to correct a district court's legal mistakes is fundamental. It has long been established that, if a finding of fact is derived from the application of an improper legal standard to the facts, it cannot stand. *U.S. v. Singer Mfg. Co.*, 374 U.S. 174, 194 n.9 (1963). Certainly, it is not necessary for this Court to review this question.

IV. THIS COURT SHOULD NOT GRANT CERTIORARI ON THE BASIS OF ALLEGED FACTUAL ERROR BELOW.

The third Question Presented by petitioners is whether the Fifth Circuit erred by upholding a District Court factual finding. The petitioners contend that the District Court placed too much weight on the fact that in the predominantly white Central Supreme Court District two black Supreme Court candidates defeated well known white opponents, and that these victories were achieved with substantial white support. The District Court determined that in the Central District black candidates and voters enjoyed substantial electoral success in Supreme Court elections. This success was obtained because there was no legally significant white bloc voting in the Central District. The Fifth Circuit ruled that this finding was not

clearly erroneous and should not be disturbed. Even if this Court should view the evidence on this point differently than did the District Court, it is well settled that this Court does not sit to correct factual errors. Certiorari should not be granted on the question of whether the District Court assigned too much importance to the electoral success of black Supreme Court candidates.

V. GENERAL FACTUAL MATTERS WHICH SUPPORT DENIAL OF THE WRIT.

Many of petitioners' factual assertions set forth in their petition are inaccurate or incomplete. In accordance with Rule 15 of the Rules of the Supreme Court, respondents bring to the Court's attention the following inaccuracies:

(a) Petitioners state that the district lines dissect the black population of the state. (Pet. p. 3) The impression petitioners attempt to make is that the state's black population is fragmented by the district lines and that the lines were drawn to achieve this result. This is not the case. Over 46% of the state's black population reside in the Central Supreme Court District. If all contiguous counties or all contiguous precincts having substantial black population were added to the Central Supreme Court District, such district would still contain a white voting age majority population. Moreover, the district lines have remained basically unchanged since 1832. (Supp. App. 63sa) Also, petitioners voluntarily dismissed their constitutional claims alleging purposeful discrimination in the creation or maintenance of the current Supreme Court districts or method of electing justices. (Supp. App. 23sa)

(b) Petitioners assert that their expert analyzed several hundred elections over a period of 25 years. (Pet. pp. 4, 11) This is incorrect. Petitioners' expert analyzed a relatively small number of elections in a few areas of the state, for which he offered specific voting data. The apparent basis for this inflated number is petitioners' con-

tention that their expert analyzed the 1989 and 1990 trial court races and the 1991 legislative races. Dr. Lichtman's analysis of the trial court races was faulty since it consisted of a compilation of aggregated satistics, thus making it impossible to determine the degree of polarization in any given race. Dr. Lichtman offered no data or election returns in connection with the legislative races. His analysis of these elections is merely an observation that black candidates were running in and being elected from districts with substantial black populations.

(c) Petitioners contend that the District Court did not accept respondents' expert, Kathryn Hester, as an expert and political analyst in voting patterns. (Pet. p. 5) This is an inaccurate characterization. Ms. Hester had considerable experience in analyzing election returns. The District Court did accept Ms. Hester as an expert (Brief, App. 5a-6a) and did permit her to testify regarding her extreme case analysis of the Banks election and numerous other judicial races. (Supp. App. 50sa, 52sa-54sa) Moreover, respondents countered petitioners' stipulated expert testimony with its own stipulated expert testimony, which revealed that black and white voters do not generally prefer different judicial candidates, especially in Supreme Court elections.

(d) Petitioners state that the Fifth Circuit did not discuss the advantages Justice Banks had running as an incumbent. (Pet. p. 9) It is evident that the Fifth Circuit carefully examined the circumstances surrounding the elections of both Justice Reuben Anderson and Justice Fred Banks and concluded that the District Court had valid reasons for not discounting these elections. (Supp. App. 15sa) Both Justices Anderson and Banks had been incumbents for very short periods before their elections. Moreover, there was evidence before the District Court that such incumbency is a typical factor in Supreme Court elections. Also, petitioners assert that Justice Banks had to conduct a stealth campaign. Their own witness dis-

putes this allegation. Petitioners' expert in judicial campaign strategy, Bob Owens, testified that the accepted strategy for black candidates in judicial races is to avoid the media and not to campaign in the white community. However, in Justice Banks' case, white support was needed so they campaigned in the white community. (Pet. App. 36a) The District Court concluded that the races of Justice Banks and his white opponent, Judge "Chet" Dillard, were well known by the voters. (Supp. App. 55sa)

(e) Petitioners suggest that the Anderson and Banks elections should be discounted for the additional reason that they occurred during the pendency of this and related litigation. (Pet. p. 10) Unlike the situation before the District Court in *Gingles v. Edmisten*, 590 F. Supp. 345, 367 n. 27 (E.D. N.C. 1984), there was no evidence in this case that the defendants fielded Justice Anderson or Justice Banks for purposes of mooting the lawsuit. While such engineering might occur in local races with small constituencies, it is highly unlikely that such engineering could ever occur in races involving ⅓ of the state.

(f) Petitioners contend that certain election features in Supreme Court elections are dilutive of minority votes, i.e., numbered post provisions, anti-bullet voting requirements and majority vote requirements in primaries. (Pet. p. 9)

There is no anti-bullet vote requirement in Supreme Court races. Also, there was no evidence before the District Court that the majority vote requirement disadvantaged any black Supreme Court candidates. Finally, the District Court found that the petitioners had abandoned their challenge to the numbered post feature of Supreme Court elections. (Supp. App. 43sa) Petitioners had asked the District Court to take judicial notice of its findings in *Martin v. Allain*, 658 F. Supp. 1183 (S.D. Miss. 1987), with respect to the numbered post election feature in certain trial court districts. The District Court refused to do so, concluding that those findings were not relevant to

Supreme Court races. (Brief, App. 7a) Petitioners did not appeal this finding of the District Court. (Brief, App. 1a-3a) It is important to understand that post requirements are essential in Supreme Court elections so as to avoid having sitting justices running against one another while deciding the same cases.

CONCLUSION

At first blush this case may give the mistaken impression that it presents questions of large social importance. However, the simple reality is, as this case demonstrates, Supreme Court elections are not racially polarized. This reason alone makes clear that the appearance of social importance is exaggerated. The legal issues this case presents have long been settled. The procedural posture of this case is such that review should not be granted.

Respectfully submitted,

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Dated: November 2, 1993

APPENDICES

APPENDIX A

Issues Petitioners Raised In Fifth Circuit
(Brief For Appellants, Pages 1-4)

STATEMENT OF JURISDICTION

This is an appeal pursuant to 28 U. S. C. Section 1291 from a final judgment entered by the United State District Court for the Southern District of Mississippi denying plaintiffs relief pursuant to Section 2 of the Voting Rights Act of 1965, as amended, 42 U. S. C. Section, 1973 and 42 U. S. C. Section 1983.

The district court's jurisdiction was predicated upon 28 U. S. C. Sections 1331, 1343 (3) and (4), and 42 U. S. C. Sections 1973, 1973a, 1973 (a) (c), and 1973 (j) (f).

Statement Of Issues

The instant voting rights action presents issues regarding whether or not the district court's findings of fact were sufficiently detailed as required by Fed. R. Civ. P. 52 (a), whether or not the district court's findings of fact on critical and ultimate facts were clearly erroneous, whether or not the district court properly considered opinions and conclusions from a witness who was not qualified as an expert witness, and whether or not the district court properly applied the legal standard for determining minority vote dilution. The issues involved in this appeal are as follows:

1. Were the requirements of Fed. R. Civ. P. 52 satisfied when the district court reached a conclusion on the Zimmer factor of the extent of minority electoral success without discussing substantial relevant contrary evidence?

2. Were the requirements of Fed. R. Civ. P. 52 satisfied when the district court reached a conclusion on the Zimmer factor of whether or not the Supreme Court dis-

tricts are unusually large without discussing substantial relevant contrary evidence?

3. Were the requirements of Fed. R. Civ. P. 52 satisfied when the district court reached a conclusion on the Zimmer factor that the state policies that multi-member at-large districts utilizing staggered terms were not tenuous without discussing substantial relevant contrary evidence?

4. Should a district court rely heavily on the opinions and conclusions of a witness offered by a party as an expert witness when the court refuses to accept the witness as an expert in the field tendered?

5. Was the district court's finding of fact that "the election of Anderson and the election of Banks to the Mississippi Supreme Court were not aberrational but evidence that whites will not necessarily vote as a bloc for white candidates having black opponents in Mississippi Supreme Court elections so as to 'usually defeat the minority's preferred candidate" clearly erroneous under Fed. R. Civ. P. 52?

6. Was the finding of fact that black voters are apathetic and fail to exercise their obligation to vote clearly erroneous under Fed. R. Civ. P. 52.?

7. Was the district court's finding of fact that the state policy which allows the use of multi-member at-large districts in elections for judges on the Mississippi Supreme Court to staggered terms is not tenuous clearly erroneous under Fed. R. Civ. P. 52?

8. Was the finding of fact that plaintiffs did not prove their minority vote dilution claim with respect to the Central Supreme Court District of the State of Mississippi clearly erroneous under Fed R. Civ. P. 52?

3. Was the district court's finding of fact that the state policy maintaining the existing district lines in elections for judges on the Mississippi Supreme Court foreclosed plaintiffs' district lines vote dilution claim clearly erroneous under Fed. R. Civ. P. 52?

10. Was the district court's findings that the state policy of drawing Supreme Court districts along county lines foreclosed plaintiffs' district lines vote dilution claim clearly erroneous under Fed R. Civ. P. 52?

11. Was the district court's findings that plaintiffs failed to prove by a preponderance of the evidence that a second subdistrict with a black voting age majority could be created in plaintiffs' district lines vote dilution claim clearly erroneous under Fed R. Civ. P. 52?

12. Did the district court accord proper weight to the Thornburg and Zimmer factors established by plaintiffs in their Section 2 vote dilution line challenge claim?

13. Does a district court's reliance upon traditional remedies for a vote dilution claim preclude plaintiffs from proving a vote dilution claim utilizing the traditional remedies in the liability stage of the litigation when those remedies may not be offered at the remedial stage of the litigation?

14. Did the district court properly apply the law to the facts proven by plaintiffs in the instant case?

APPENDIX B

Petitioners' Position On Voting Age Population
(Trial Transcript, p. 326, February 27, 1992)

Rights Act allows the black voters the opportunity to decide when they want to select someone to office and not depend on the goodwill of white voters to say, okay, it's time for us now to allow another black.

THE COURT: All right.

MR. RHODES: The Supreme Court in *Thornburg*, as recognized by *Dickinson v. Indiana State Board of Elections*, stated that only a simple majority of eligible voters in a single district is required to establish liability. What Plaintiffs' expert Senator Kirksey testified to was—

THE COURT: As recognized in what? *Thornburg*?

MR. RHODES: *V. Gingles*.

THE COURT: All right. I know that one.

MR. RHODES: Cited in *Dickinson v. Indiana State Board of Elections*, a Seventh Circuit case, found at 933 F.2d 497, at page 503. And in the *Dickinson* case, the question was presented whether or not the Plaintiffs had to show that they could remedy the violation and the Seventh Circuit said no. In order to establish liability, only a simple majority of eligible voters in single district —single-member districts have to be black. You do not have to prove the remedy at the liability stage, just show that you can draw a single-member district.

THE COURT: That flies in the face of *Martin v. Allain*.

APPENDIX C

District Court's Ruling On Expert Qualifications Of Kathryn Hester (Trial Transcript, pp. 168-169, February 26, 1992)

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numbers from specific counties rather than any projection for other counties; is that correct?

MR. KIRCHMAYR: Well, I think she would give a—I don't know—I think she would give an opinion, Your Honor, based upon her review of the material that she's had, which could be a projection. And I think on the other side of the coin, Your Honor, I think that she would also indicate, especially on voter registration, the difficulty that is involved in coming up with a model or the exact figures without a complete massive re-registration in the state.

THE COURT: All right. What's bothering the Court is, Number 1, in *Thornburg v. Gingles* the Supreme Court made some very specific pronouncements as to types of methodology to be used in analyzing cases under the Voting Rights Act, and the admonition of the circuit court of this circuit as far as making sure that experts are, in fact, experts. The Plaintiff has not questioned the expertise of the witness in regard to analyzing statistical data or redistricting or drawing redistricting lines, and the Court certainly will recognize her in those areas. The Court has been questioning the third theory, and that is perhaps her expertise to analyze voting patterns and re-registration patterns. Her expertise in that area is not from specific training in statistics or political science or other social sciences. Her experience is not from working in those fields on a professional basis. Her expertise there derives from a practical working in the general area from having been active on a strictly political side of things rather than on academic or business research side. However, because her testimony is going to be somewhat limited in these fields and will be used to test a nonstandard

method advanced by Dr. Lichtman, the Court thinks the testimony would be helpful to the Court and will allow her to testify and give opinions. Why don't before we—I think that would then conclude your qualification testimony?

MR. KIRCHMAYR: Yes, Your Honor.

THE COURT: I presume that you now are ready to get into—

MR. KIRCHMAYR: The district lines, Your Honor.

THE COURT: Why don't we take a recess at this time and we will come back and start with the testimony. We will stand in recess until ten minutes of 11:00.

(Recess.)

THE COURT: All right. Mr. Kirchmayr.

DIRECT EXAMINATION
(CONTINUING)

BY MR. KIRCHMAYR:

Q. Ms. Hester, at our request, have you had any occasion to draw redistricting plans for the present Supreme Court districts?

APPENDIX D

District Court's Ruling That *Martin* Findings On Post System In Trial Court Elections Irrelevant (Trial Transcript, p. 121, February 25, 1992)

The Court finds that it should not take judicial notice that the post system in chancery and circuit court elections was tenuous as found in fact 35 on pages 1195 and 96, as that is simply not relevant to this lawsuit.

The Court is going to reserve a ruling in regard to the request to take judicial notice that in the Ninth Circuit Court District, two judges are elected and voters can single-shot vote for one candidate. It is the Court's understanding that the parties are going to see whether they can reach a stipulation that is satisfactory to both sides regarding that particular issue. If not, the Court will consider a further request regarding those issues at a later time.

Mr. Rhodes, I believe that covers all the issues that the Plaintiffs requested the Court to take judicial notice of?

MR. RHODES: I apologize to the Court, Your Honor. I overlooked one additional. It was at the time of the opinion in *Martin v. Allain*. We would ask the Court to take judicial notice of fact 26 concerning racially polarized voting.

THE COURT: 26?

MR. RHODES: Yes, sir.

THE COURT: All right.

MR. KIRCHMAYR: Your Honor, we object to that for

APPENDIX E

Petitioners' Election Not To Challenge Finding That BVAP Majority Subdistricts Could Not Be Created In Northern And Southern Supreme Court Districts (Brief For Appellants, p. 19)

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could be maintained only in an east-west line configuration is tenuous.

Plaintiffs proved that a majority black VAP (voting age population) single-member district could be created within the existing Central Supreme Court District [10], black voters are politically cohesive, and white bloc voting is legally significant within the Central District.[11]

Busbee agreed, that a turnover of almost one half of the Supreme Court could occur this election year, and it is possible that there could be a wholesale turnover on the Supreme Court in any given few years. [Tr. 146-147, 270]. Additionally, staggered terms could be maintained if the Supreme Court was divided into nine single-member districts.

The court has found that "the policy of post system elections in multi-judge chancery circuit and county court judicial districts is tenuous." *Martin v. Allain*, 658 F. Supp. 1183, 1195-96 (S. D. Miss. 1987). The policy of numbered posts with respect to Supreme Court elections is the same as the policy with respect to Circuit and Chancery Court elections. If it is tenuous for one it is tenuous for all.

[10] Plaintiffs offered proof that majority black single-member districts could be created within the Northern and Southern Supreme Court districts as well. [Tr. 71]. Defendants offered proof that such districts could not be created. [Tr. 178-180]. Since there were two competing plausible views of the evidence on this issue, and the district court weighed this evidence against plaintiffs, plaintiffs do not challenge that finding on appeal. See *Anderson v. City of Bessemer City*, 470 U.S. 564, 573-74, 105 S. Ct. 1504, 1511, 84 L. Ed. 2d 518 (1985); *Mississippi State Chapter, Operation Push v. Mabus*, 932 F.2d 400, 410 (5th Cir. 1991).

[11] See Footnote 5 and accompanying text.

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

No. 93-647

MAGNOLIA BAR ASSOCIATION, INC., *et al.*,
Petitioners.

AKMIS E. HAWKINS, CHIEF JUSTICE OF THE SUPREME COURT OF MISSISSIPPI , et al .,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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PETITIONERS' REPLY BRIEF

INTRODUCTION

Petitioners, Magnolia Bar Association, Inc., et. al., file this Reply Brief, pursuant to Sup. Ct. Rule 15, to address issues first raised in Respondents' Brief in Opposition.

Contrary to respondents arguments, the reasons for granting the Writ are substantial.

REASONS FOR GRANTING THE WRIT

I.
THE QUESTIONS PRESENTED IN THE PETITION FOR WRIT OF CERTIORARI WERE PRESENTED TO OR DECIDED BY BOTH THE DISTRICT COURT AND THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

Respondents argue that three of the five questions presented in petitioners' Petition for Writ of Certiorari were neither presented to nor decided by the United States Court of Appeals for the Fifth Circuit. [Brief in Opposition, pp. 4-5]. Specifically, respondents argue that petitioners advanced a contrary position in the District Court on the issue of whether total minority population or minority voting age population is the relevant inquiry when considering the first *Thornburg*[1] precondition. [Brief in Opposition, p. 4]. And, they argue that petitioners did not appeal the District Court's finding "that a new three-judge district having a black voting age population could be drawn in a north-south direction." [Brief in Opposition, p. 4]. Finally, respondents argue that petitioners failed to appeal or press the issues of: (1) whether a district court may properly consider totality of the circumstances evidence in deciding whether or not the three *Thornburg* preconditions have been met, and (2) whether the appellate court applied the proper legal analysis in deciding the issue of legally significant white bloc voting. [Brief in Opposition, pp. 4-5]. Respondents are wrong on all of those arguments for several reasons.

First, petitioners argued in the District Court that, in *Thornburg,* the Supreme Court indicated that "a black

[1] *Thornburg v. Gingles*, 478 U. S. 30 (1986).

majority population would be sufficient."[2] The District Court acknowledged the arguments when it held, "[i]t is important that, although *Thornburg* does not so expressly require, the Fifth Circuit has interpreted the first part of the tripartite test to require plaintiffs to show a majority of the *voting age* population in a single-member district, as opposed to a majority of the total population." [Supp. App. 36sa]. On appeal, the Fifth Circuit held that petitioners did not challenge the district court's findings that "blacks would not constitute a majority of the *voting age population* in any of the north-south multimember districts proposed by [petitioners]." (emphasis added) [Supp. App. 16sa].[3] This

[2]The above quotation is found in the arguments of counsel at the conclusion of the trial. [Trial Transcript, p. 328]. Relevant portions of the argument are set out here only because the respondents failed to include page 328 in their Appendix B to Brief in Opposition, p. 4a. The actual inquiry from the District Court on this issue and petitioners' response, as found on page 328 of the Trial Transcript, are:

THE COURT: Do you agree that a black majority voting-age population is the key?

MR. RHODES: The courts of appeals, *Dickinson* in Seventh Circuit and *Westwego* in Fifth Circuit have held that; but in *Thornburg*, the Supreme Court indicated that a black majority population would be sufficient. But the courts of appeals have said that it's voting age population that counts, and I agree that that's what the courts of appeals have established. When you challenge multi-member districts.

[3]Petitioners challenged, on appeal to the court of appeals, the district court's findings on the first *Thornburg* precondition on their vote fragmentation (line challenge) claim. Specifically, petitioners raised and briefed issues in the court of appeals concerning whether the district court erred in determining that petitioners could not create a black majority voting age population three judge district. [See, Appendix to Brief in Opposition, p. 3a, Issues 10, 11, and 12]. Petitioners argued below that a black majority voting age population three-judge district, running north to south, could be created using two split counties (but no split precincts). The district court held, however, that in satisfying the first *Thornburg* precondition, petitioners could not split counties. Petitioners argued below, and here, that split counties should be permissible in satisfying the first *Thornburg* precondition if minority voting age population is the relevant statistic. If, however, counties cannot be split in satisfying the first *Thornburg* precondition, then total minority population should be the relevant statistic. This Court had no need to pass upon

holding by the Fifth Circuit is limited to the factual findings and does not apply to the legal analysis employed by the District Court. The Fifth Circuit did not address the issue raised by petitioners of whether or not the District Court properly applied "the law to the facts proven by [petitioners] in the instant case." [Appendix to Brief in Opposition, p. 3a]. Consequently, the fourth issue contained in petitioners Questions for Review was presented to and decided by both lower courts. Even if the issue had not been presented in the Fifth Circuit, it is an important issue and the instant case presents an appropriate circumstance for this Court to address it. See, *Vance v. Terrazas*, 444 U. S. 252, 258-59, n. 5 (1980).

Second, petitioners presented to the Fifth Circuit questions of whether or not the District Court properly applied "the law to the facts proven," and whether or not the District Court's finding that "the election of Anderson and the election of Banks to the Mississippi Supreme Court were not aberrational but evidence that whites will not necessarily vote as a bloc for white candidates having black opponents in Mississippi Supreme Court elections so as to usually defeat the minority's preferred candidate" was clearly erroneous. [Appendix to Brief in Opposition, pp. 2a-3a]. Those issues closely parallel the first and second Questions Presented for Review in this Court. Those questions are important, and the instant case presents the appropriate circumstance to address them. *Id.*, at 258-59, n. 5. Even if the first and second Questions had not been raised or resolved in the lower courts, this Court "in exceptional cases coming here from the federal courts" review "questions not pressed or passed upon below..." *Duignan v. United States*, 274 U. S. 195, 200 (1927); *Youakim v. Miller*, 425 U. S. 231, 234 (1976) (per curiam). Assuming arguendo that the Questions were not squarely presented to or decided by the Fifth Circuit, the instant

this issue in *Growe v. Emison*, ___ U. S. ___ , 113 S. Ct. 1075, 1083, n. 4 (1993). The present case places the issue before the Court for resolution.

case would be an "exceptional case" requiring review for several reasons. First, the Questions Presented are not foreign to the subject matter of the complaint. Second, a clear conflict between the Circuit Courts of Appeals exists on the first Question. This Court held, in *Braxton v. United States*, ___ U. S. ___ , 111 S. Ct. 1854, 1858 (1991), that "[a] principal purpose for which we use our certiorari jurisdiction . . . is to resolve conflicts among the Circuit Courts of Appeals . . . concerning the meaning of provisions of federal law." The present case presents a conflict between the Fifth and Eleventh Circuit Courts of Appeals on an important issue of federal law. Finally, this "Court has 'the power to notice a 'plain error' though it is not assigned or specified." *Silber v. United States*, 370 U. S. 717, 718 (1962) (per curiam).

As such, the first, second, and fourth Questions Presented for Review are properly before this Court.

II.
ALL QUESTIONS PRESENTED ARE SUBSTANTIAL

Respondents argue that petitioners' third and fifth Questions Presented are not substantial. [Brief in Opposition, pp. 5-6]. Their arguments are misplaced. The third Question Presented gives this Court an opportunity to instruct lower courts on how evidence of the election of minority incumbents in racially polarized elections is to be weighed in determining legally significant white bloc voting. Although presently problematic for lower courts, this Question will be increasingly moreso as more minority incumbents are elected in jurisdictions with a history of severe racially polarized voting and voting rights litigation.

Regarding the fifth Question Presented, respondents argue that the Fifth Circuit did not substitute its judgment on findings of fact for the district court's. [Brief in Opposition, pp. 5-6]. Rather, respondents argue, the

Fifth Circuit corrected the district court's "misunderstanding of the governing rule of law." [Brief in Opposition, p. 6]. If respondent's assessment of the Court of Appeals' decision is correct, then the fifth Question Presented is substantially more important. The district court allowed petitioners to use "the entire state of Mississippi as the challenged election district" in order to prove the *Thornburg* preconditions on their vote fragmentation (line) challenge.[4] [Supp. App. 17sa-18sa]. The Fifth Circuit held that this was error because the existing multi-member districts were the appropriate districts to use in establishing the *Thornburg* preconditions on petitioners vote fragmentation (line) challenge. [Supp. App. 18sa]. This Court, just last term, in *Growe v. Emison*, supra, 113 S. Ct. at 1084, held that the *Thornburg* precondition analysis applies to vote fragmentation claims. The Court did not instruct lower federal courts, in *Growe*, how to conduct that analysis in such claims. Specifically, this Court did not instruct lower federal courts which districts were relevant in analyzing district specific evidence on the issue of legally significant white bloc voting. The fifth Question Presented invites this Court to instruct lower federal courts which districts are relevant in analyzing district specific evidence on the issue of legally significant white bloc voting.

[4]The Fifth Circuit held that petitioners presented three challenges under Section 2 of the Voting Rights Act, one - a challenge to the existing at-large method of election from multi-member districts, two - a challenge to the existing district lines, and three - a hybrid line-drawing/multimember challenge. [Supp. App. 4sa-18sa]. The District Court, on the other hand, found that petitioners presented only two challenges under Section 2 of the Voting Rights Act, one - a challenge to the existing at-large method of election from multi-member districts, and two - a challenge to the existing district lines. [Supp. App. 21sa-22sa, 43sa-78sa]. On Petitioners' line challenge, the district court correctly employed the *Thornburg* precondition analysis using the entire state as the district for obtaining district specific evidence of racially polarized voting. This challenge, after all, went to the entire state and not to just one segment.

III.
PETITIONERS DO NOT SEEK REVIEW OF EVIDENCE

Contrary to respondents arguments, [Brief in Opposition, pp. 9-10], petitioners are not asking this Court to review factual findings by the lower federal courts on the issue of legally significant white bloc voting. Petitioners merely ask this Court to announce principles setting forth the proper legal analysis to be employed by lower federal courts in determining legally significant white bloc voting. Petitioners third Question Presented is substantial.

IV.
PETITIONERS HAVE NOT MISSTATED THE FACTS OR EVIDENCE

Contrary to respondents arguments, [Brief in Opposition, pp. 10-13], petitioners have not misstated facts or record evidence. Regarding petitioners' argument that the existing Mississippi Supreme Court districts fracture an otherwise concentrated black population, the District Court acknowledged the presentation of such evidence by the petitioners. [Supp. App. 22sa, 66sa]. Petitioners made no contention during the trial and make none here that this fracturing is intentional. Rather, petitioners argued that this fracturing results in discrimination against black citizens and voters. Respondents are wrong in their assertion that the analysis of voting patters "of the trial court races" by petitioners' expert, Dr. Allan Lichtman, "was faulty." [Brief in Opposition, pp. 10-11]. The District Court found, based upon "substantial evidence that whites have voted as a bloc in elections for state trial judges," and that "whites in Mississippi generally vote as a bloc." [Supp. App. 74sa]. Regarding respondents' assertions that the district court accepted their expert testimony on the issue of racial bloc voting,

the assertions are wrong. Respondents submitted stipulated expert testimony, based upon an analysis of all contests - including white vs. white elections, that racial bloc voting did not exist in Mississippi elections. The district court rejected this testimony holding that "[e]lections that involve both black and white candidates are most probative of racially polarized voting," in general, [Supp. App. 39sa], and "white bloc voting" in particular. [Supp. App. 40sa]. Contrary to respondents' arguments, the appellate court did not discuss or consider the advantages Justice Banks enjoyed as an incumbent. [Supp. App. 15sa]. And, there was no proof presented, as respondents argue, that "it is highly unlikely that such engineering [as appointing blacks to the Supreme Court during litigation] could ever occur in races involving 1/3 of the state." [See, Brief in Opposition, p. 12, compare record, App. 1-60, Supp. App. 1sa-78sa]. Finally, respondents erroneously argue that "no anti-bullet voting requirement" is present in Mississippi Supreme Court elections, no evidence was presented that majority vote requirements disadvantage minorities, and that the district court found that petitioners had "abandoned their challenge to the numbered post feature of Supreme Court elections." [Brief in Opposition, p. 12]. Petitioners racial bloc voting evidence indicates a disadvantage African-American voters have with the majority vote requirement in white majority districts. [App. 4a-7a, 41a-42a]. The evidence also shows that an anti-bullet voting requirement is present in Supreme Court elections, Id. And, finally, the district court did not find that petitioners had abandoned their challenge to the numbered post feature of Supreme Court elections. [Brief in Opposition, p. 12]. The district court only held that petitioners "proof focused on the at-large, multimember aspects of the system and did not directly address the numbered post and staggered term features." [Supp. App. 43sa]. The District Court considered "the numbered post and staggered term features only insofar as they [were] implicated in a discussion of the at-large, multimember

features of the supreme court electoral system." [Supp. App. 43sa-44sa].

CONCLUSION

The Questions Presented in the Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit are substantial. This Court should grant certiorari review of the Fifth Circuit's decision in this case.

Respectfully submitted,
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